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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 177.

DANIEL M. MORRISON, PLAINTIFF IN ERROR,

vs.

JOHN G. WATSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

FILED SEPTEMBER 12, 1890.

(14,143.)

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1 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorables the judges of the supreme court of the State of North Carolina, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Carolina, before you or some of you, being the highest court of law or equity of said State in which a decision could be had in said suit between Daniel M. Morrison and John G. Watson, in which the said Daniel M. Morrison was appellant, wherein was drawn in question the validity of a statute of said State on the ground of its being repugnant to the Constitution of the United States and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution of the United States and the decision was against the title, right, privilege, or exemption specially set up and claimed under the said clause of the said Constitution, all of which appears in the record and proceedings in said suit, a manifest error hath happened, to the great damage of the said Daniel M. Morrison, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 4th day of September, in the year of our Lord one thousand eight hundred and ninety.

[Seal United States Circuit Court, Eastern Dist. of N. C.]

N. J. RIDDICK,
Clerk of the Circuit Court of the United States for the Eastern District of North Carolina.

Allowed by—
A. S. MERRIMON,
Chief Justice of the Supreme Court of North Carolina.

2 The United States of America to John G. Watson, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Carolina, wherein Daniel M. Morrison is plaintiff in error and you

are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable A. S. Merrimon, chief justice of the supreme court of North Carolina, this fifth day of September, in the year of our Lord one thousand eight hundred and ninety.

A. S. MERRIMON,
Chief Justice, &c.

3 On this sixth day of September, in the year of our Lord one thousand eight hundred and ninety, personally appeared John P. Cameron before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John G. Watson on this 6th day of September, 1890.

JOHN P. CAMERON.

Sworn to and subscribed the sixth day of September, A. D. 1890.

[Seal Richmond Superior Court, North Carolina.]

Z. F. LONG,
Clerk Superior Court of Richmond County, North Carolina.

4 North Carolina Supreme Court.

DANIEL M. MORRISON
vs.
JOHN G. WATSON.

Know all men by these presents that we, Daniel M. Morrison, as principal, and Marion L. Hinson and William A. McDonald, as sureties, are held and firmly bound unto John G. Watson in the full and just sum of five hundred dollars, to be paid to the said John G. Watson, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eighth day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a term of the supreme court of the State of North Carolina, in a suit depending in said court between Daniel M. Morrison and John G. Watson, judgment was rendered against the said Daniel M. Morrison, and the said Daniel M. Morrison having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said John G. Watson, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Daniel M. Morrison shall prosecute his said writ of error to effect and answer all costs if he fail to make his plea good, then the

above obligation to be void; else to remain in full force and virtue.

(Signed) D. M. MORRISON. [SEAL.]
MARION L. HINSON. [SEAL.]
WILLIAM A. McDONALD. [SEAL.]

Sealed and delivered in presence of—
——— ———.

Approved by—
A. S. MERRIMON,
Chief Justice Supreme Court, North Carolina.

NORTH CAROLINA, }
Richmond County. }

Marion L. Hinson, being duly sworn, says that he is worth the sum of five hundred dollars over and above his debts and liabilities and in excess of his homestead and personal-property exemptions.

MARION L. HINSON.

Subscribed and sworn to before me this 8th Sept., 1890.

Z. F. LONG,
Clerk Superior Court of Richmond County, N. C.

NORTH CAROLINA, }
Richmond County. }

William A. McDonald, being duly sworn, says that he is worth the sum of five hundred dollars over and above all his debts and liabilities and in excess of his homestead and personal-property exemptions.

WILLIAM A. McDONALD.

Subscribed and sworn to before me this 8th Sept., 1890.

Z. F. LONG,
Clerk Superior Court of Richmond County.

6 I, Thos. S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a true copy of the bond filed in this court in the case of Morrison *v.* Watson.

In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this the 9th day of September, 1890.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

7 STATE OF NORTH CAROLINA, *Richmond County.*

In the Superior Court.

DANIEL M. MORRISON *v.* JOHN G. WATSON. } Summons for Relief.

The State of North Carolina to the sheriff of Richmond county, Greeting:

You are hereby commanded to summons John G. Watson, the defendant above named, if he be found within your county, to be and appear before the judge of the superior court, at the court-house, in Rockingham, on the 14th Monday after the 3rd Monday of February, 1883, and answer the complaint, which will be deposited in the office of the clerk of the superior court of said county, within the first three days of said term, and let the said defendant take notice that if he fail to answer the said complaint within that time the plaintiff will apply to the court for the relief demanded in the complaint. Hereof fail not, and of this summons made due return.

Given under my hand and seal of said court this 11th day of April, 1883.

(Signed) Z. F. LONG,
Clerk Superior Court, Richmond Co.

8 Endorsed: Summons for relief. Returnable to spring term, 1883, of the superior court of Richmond county. Received April 11th, 1883. Served May 15th, 1883, by reading the within summons to John G. Watson. Fee: Sheriff's fee, 60c.; mileage, —. J. M. Smith, sheriff Richmond Co.

Complaint.

Richmond Superior Court, Spring Term, 1883.

The plaintiff, complaining, alleges:

1. That he is the owner of and entitled to the immediate possession of the following tracts of land, in the county and State aforesaid, viz:

One tract beginning at the 4th corner of lot No. 5, in the division of the land of John Watson, Sr., and runs north 45 east 60 poles to a stake; then north 40 west 62 poles to a stake, Hampton Covington's old corner; then south 46 west 62 poles to the 5th corner of lot No. 5; then direct to the beginning, containing 22 acres, more or less.

One other tract beginning at a stake, a corner between the lands of John Watson, Sr., and Hampton Covington, southwest of the residence of the late John Watson, deceased, and runs north 58 east 32 poles to a corner, a stake; then north 48 west 128 poles; then south 50 west 16 poles to a stake near the head of a small branch, supposed to be Hampton Covington's corner; thence direct

to the beginning, containing 18 acres, more or less, including the dwelling and some of the outhouses.

9 One other tract of land beginning at a stake, the 3rd corner of lot No. 1 and 4th corner of lot No. 7, in the division of the lands of John Watson, Sr., and runs north 38 west 88 poles to the corner of lot No. 7; then south 50 west 44 poles, crossing the old Crawford road, to a stake; then south 40 east 82 poles to a corner; then north 50 east 42 poles to the beginning, containing 25 acres, more or less.

One other tract of land beginning at the 4th corner of lot No. 4, and runs north 40 east 42 poles; then north 45 east 24 poles to a stake; then north 62 west 72 poles to a stake, a corner of Henry Hampton Covington's land; then south 38 west 60 poles to a stake; then south 46 west 32 poles to the 5th corner of lot No. 4; then as the 4th line of said lot south 38 east 132 poles to the beginning, containing 35 acres, more or less.

2. That defendant unlawfully withholds the possession of said lands from the plaintiff.

Wherefore plaintiff demands judgment for the possession of said land and for two hundred dollars, damages for wrongfully withholding the same.

D. M. MORRISON,
JNO. D. SHAW,
FRANK McNEILL.
Att'ys for Pl'ff.

D. M. Morrison personally appeared before me, and, being duly sworn, says that the foregoing complaint is true except as to those matters stated on information and belief, and as to those matters he believes it to be true.

D. M. MORRISON.

Sworn to and subscribed before me—

Z. F. LONG, *C. S. C.*

10 Endorsed: Filed June 1st, 1883. Z. F. Long, C. S. C., per McDonald, D. C.

Richmond County Superior Court, Spring Term, 1883.

The defendant above named, answering, says:

1. That the allegations in the first clause of the complaint are not true.

2. That the allegation in the second clause is not true.

BURWELL, WALKER & TILLETT,
Defendant's Attorneys.

John G. Watson, being duly sworn, says that the above answer of his own knowledge is true except as to matters stated on information and belief, and as to those he believes it to be true.

JOHN G. WATSON.

Sworn to and subscribed before me this 6th June, 1883.

Z. F. LONG, *C. S. C.*

Endorsed: Answer.

Minutes of September Term, A. D. 1887.

Minutes, Tuesday, Sept. 27th.

D. M. MORRISON
vs.
JOHN G. WATSON.

Then the following jury, to wit, J. M. Liles, J. P. Yates, W. R. Covington, Malcom Monroe, Daniel Watson, Z. O. Ellerbe, Henry Brigman, D. T. McIntyre, C. J. Wright, Geo. W. Wright, D. M. McNair, H. W. Covington, being duly sworn and empannelled to try the civil issues herein joined, do for their verdict say:

1st. Is the plaintiff the owner of and entitled to the immediate possession of the land described in the complaint?

Ans. No.

11 2nd. Did the defendant at the time of bringing this suit unlawfully withhold the possession thereof?

Answer. No.

3rd. What damage is the plaintiff entitled to recover?

Answer. ——.

Minutes, Wednesday, Sept. 28th.

D. M. MORRISON
vs.
JOHN G. WATSON.

Motion for new trial; motion overruled; appeal to supreme court; notice waived; bond fixed at $40.00.

Minutes, Saturday, Oct. 1st.

D. M. MORRISON
vs.
JOHN G. WATSON.

Motion to set aside verdict against the weight of evidence; motion overruled; motion for new trial for errors in law; motion for new trial overruled; judgment; appeal by plaintiff; notice given in open court; bond, $40; by consent, 30 days thereafter to serve case on appeal and thirty days thereafter to serve counter-case or exceptions.

Richmond County, in Superior Court, September Term, 1887.

This cause coming on to be heard upon the verdict of the jury, and the jury having found that the plaintiff is not the owner of and entitled to the possession of the land described in the complaint—

Now, upon motion of counsel for defendant, it is adjudged that the plaintiff take nothing by his action; that the defendant go without day and recover his cost of the plaintiff and his sureties on the prosecution bond, to be taxed by the clerk of this court.

H. C. CONNOR,
Judge Presiding.

Endorsed: Recorded on Minutes, pages 74 & 75, Oct. 1st, '87. Z. F. Long, C. S. C., by W. H. C., D. C.

12 Richmond Superior Court, September Term, 1887.

This was a civil action for the recovery of land, heard before Connor, judge, and a jury, at the September term, 1887, of Richmond superior court.

The plaintiff claimed title to the land described in the complaint by virtue of an execution sale and sheriff's deed made pursuant thereto.

The defendant denied that the plaintiff was the owner of the land or that he wrongfully withheld possession thereof. He admitted being in the possession.

The following issues were, without objection, submitted to the jury:

1st. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint?

2nd. Did the defendant at the time of the bringing of this action unlawfully withhold possession thereof?

3rd. What damages is the plaintiff entitled to recover?

The plaintiff put in evidence a deed from Z. F. Long, sheriff, to himself for the land in controversy, dated August 26th, 1882, and duly recorded. The said deed purported to convey the land in dispute; also one hundred and sixty acres in addition, made up of one tract of one hundred acres, one of fifty acres, and one of ten acres. The plaintiff also showed in evidence a judgment rendered at spring term, 1870, of the superior court of Richmond county in favor of S. T. Cooper and R. S. Ledbetter, executors of Stephen Pankey, deceased, *vs.* Thomas Watson, Peter Hanner, and John G. Watson for thirty-five dollars, with interest on the same from the 13th day
13 of November, 1864, and the costs, docketed May 17th, 1870. Executions were regularly issued thereon until Oct. 4th, 1873.

On the 20th day of October, 1873, the said judgment was transferred to Z. B. Moore. On the 2nd day of April, 1879, leave was given the plaintiff in said judgment to issue execution, and on April 5th, 1879, an execution was duly issued thereon. The same was duly levied upon the lands in controversy, as will more fully appear by reference to the copy of said execution hereto attached.

The sheriff proceeded, on the 9th day of June, 1879, to sell the said land, when the same was purchased by Z. B. Moore for the sum of forty dollars; on the same day he transferred his bid to the plaintiff. He also transferred the said judgment to the plaintiff.

The plaintiff showed in evidence the judgment-roll in the aforesaid judgment, including the note upon which the same was founded, executed by Thomas Watson, Peter Hanner, and the defendant, John G. Watson, for $111, dated Nov. 13th, 1863, and due twelve months after date. The plaintiff also showed in evidence a judgment in favor of Frank Sandford *vs.* John G. Watson, dated June, 1876, for $15.85, interest from May 6th, 1860, upon which execution issued January 6th, 1879; no homestead was ever allotted to the defendant.

The plaintiff, for the purpose of showing that the lands of the defendant were, in June, 1879, worth less than $1,000 and the amount of the judgment, after objection by defendant and exception to its admission, introduced W. J. EVERETT, who testified that he knew the land formerly owned by John G. Watson, Sr., but did not know the dividing lines. He knew where the dwelling was; also the twenty-five acres; that in June, 1879, in his opinion from three ($3) to four ($4) dollars per acre was a fair valuation. He could not say as to the eighteen acres. The whole tract con-
14 tained two hundred and twenty-seven acres. In respect to the one hundred acres, he only knew its value by comparison with other similar tracts in the neighborhood; had not been on it; could not say how long before 1879 he last saw the lands. The plaintiff proposed to ask the witness the value of the one hundred acres. Objected to by the defendant, because the witness states that he cannot give the value of the land except by comparison with other tracts in the neighborhood. Objection sustained. Plaintiff excepted.

W. A. MCKAY said that he knew the land in June, 1879; it was then worth from $1.50 to $2.00 per acre. The fifty-acre tract was worth the same. The ten-acre tract was worth $1.00 per acre.

W. H. COVINGTON said that he knew the land in June, 1879; has known it all his life. The twenty-acre tract was worth in June, 1879, $3.00 per acre; the eighteen acres from $2.50 to $3.00 per acre; the twenty-five acres from $3.00 to $3.50 per acre; the thirty-five-acre tract from $2.50 to $3.00 per acre.

H. B. MCCORMACK said that he knew the land. In June, 1879, the one hundred acres was worth from $1.00 to $1.50 per acre. The fifty-acre tract was worth about the same.

The plaintiff then offered a deed from the defendant, John G. Watson, to Flora Watson, dated April 6th, 1867, for the land in controversy; consideration set out, twelve hundred dollars. Plaintiff then offered to show that the deed was fraudulent. Objected to by defendant as irrelevant. Objection sustained. Plaintiff excepted.

The defendant, upon the question as to the value of the land, introduced John F. HANNER, who, after objection by plaintiff, testified that he knew the land of the defendant which is described
15 in the sheriff's deed. The part around the house, ten or twelve acres, was worth in June, 1879, $5.00 per acre.

JOHN B. COVINGTON said that he knew the Watson home place in

June, 1879. The eighteen-acre tract was then worth $5.00 per acre; the one-hundred-acre tract was worth then $5.00 per acre. This is made up of smaller tracts. I bought land like this in 1868, and this land was worth more than that in 1879.

W. W. GRAHAM said that he knew the home place; that in June, 1879, it was worth $5.00 per acre. The twenty-two, the twenty-five, and the thirty-five acre tracts were worth $5.00 per acre; the one-hundred-acre tract was worth about $2.50 to $3.00 per acre.

The plaintiff introduced a witness (TOWNSEND), who said that the one hundred acres and the fifty acres was worth, in June, 1879, two dollars per acre.

The defendant objected to all of the testimony in regard to the value of the land, when it was offered, for that the defendant's right to a homestead and the value of his land could only be ascertained and determined in the manner provided by law and not in the first instance by a jury empanneled to try the question of title. The court, in deference to the opinion of the supreme court in this case, admitted the testimony. (Morrison *v.* Watson, 95 N. C., 479.)

The counsel for the plaintiff requested the court to charge the jury—

1. That there was no evidence that the defendants were worth in June, 1879, one thousand dollars and the judgment, interest, and costs, amounting to eighty-three dollars.

2. That upon the whole evidence the plaintiff was entitled to recover.

16 The court declined to so instruct the jury, and the plaintiff excepted. The court then instructed the jury that they could consider the whole evidence, and after ascertaining the value of the land per acre in June, 1879, they should make a calculation as to its total value.

The court then explained to the jury the issues and the way in which the testimony should be considered with respect to them, and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed, and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than one thousand dollars and the amount of the judgment, interest, and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment. (Miller *v.* Miller, 89 N. C., 402.)

The jury found the first and second issues in the negative. Motion for a new trial for reception of the evidence objected to and for refusing the instruction asked and for error in the instruction given.

Motion denied. Judgment in accordance with the verdict. Appeal by plaintiff. Notice given in open court. Bond fixed at $40.00. By consent thirty days given to serve case on appeal and thirty days thereafter to file exceptions thereto.

The foregoing case settled by me upon a disagreement of counsel.

H. G. CONNOR, *Judge, &c.*

17 The execution referred to above is as follows:

"To the sheriff of Richmond county, Greeting:

Whereas judgment was rendered on the 17th day of May, 1870, in the superior court of Richmond county in an action between S. T. Cooper and R. S. Ledbetter, executors of S. Pankey, deceased, plaintiffs, and Thomas Watson and John G. Watson, defendants, in favor of the said S. T. Cooper and R. S. Ledbetter, executors of S. Pankey, deceased, and against the said Thomas Watson and John G. Watson for the sum of $35.00, as appears to us by the judgment-roll filed in the office of the clerk of the superior court of said county; and whereas the judgment was docketed in this county on the 17th day of May, 1870, and the sum of $35.00 is due thereon, with interest on $35.00 from the 13th day of November, 1864, and the further sum of $18.39 for costs and disbursements in said suit expended, whereof the said Thomas Watson and John G. Watson are liable:

You are, therefore, commanded to satisfy the said judgment out of the property of the said defendant within your county, or if sufficient personal property cannot be found, then out of the real property in your county belonging to such defendant on the day when the said judgment was so docketed in your county or at any time thereafter, in whose hands soever the same may be, and have you this execution, together with the money, before our said court, at the court-house, in Rockingham, on the 16th Monday after the 3rd Monday in February, 1879, then and there to render the same to Z. B. Moore, assignee of plaintiff.

Issued this 5th day of April, 1879.

(Signed) D. STEWART,
Clerk Superior Court, Richmond County.
A. C. McFADGEN, *D. C.*"

18 Endorsed as follows: "Received Apr. 5th, 1879. This day levied the within execution on the following lands, to wit: Property of John G. Watson, 160 acres, adjoining the lands of the late Elijah Everett, Alfred Dockery, dec'd, and others; 25 acres on the old Crawford road, 35 acres on the north side of Hitchcock creek, adjoining Henry Hampton Covington and others, 180 acres; 100 acres on Adams branch, deeded to him by W. A. McKay, adjoining Archibald McKay, Daniel Hadley, and others; 50 acres adjoining the Hines land, 10 acres, for description see Book Y, page 292, and one piece or parcel of land lying on both sides of Barnes bridge and the Rockingham road, deeded 25th day of September, 1872. (Signed) Z. F. Long, sheriff Richmond county. This Apr. 28, 1879."

Undertaking on Appeal.

Whereas on the 28th of September judgment was rendered in the above-stated case in favor of the defendant against the *the* plaintiff; and whereas the appellant intends to appeal from said judgment to the supreme court: Now, therefore, we, D. M. Morrison, of the

county of Richmond, and W. H. Neal, of Richmond county, and A. M. Long, of said county, undertake, pursuant to the statute, that the said appellant shall pay all costs and damages that may be awarded against him on such appeal, not exceeding forty dollars.

(Signed) D. M. MORRISON.
A. M. LONG.

Justification of Sureties.

W. H. Neal and A. M. Long, above named, being severally duly sworn, says each for himself that he is a resident of the State of North Carolina and worth double the sum specified in the above undertaking over all his debts and liabilities and exclusive of property exempt from execution.

(Signed) D. M. MORRISON.
WALTER H. NEAL.
A. M. LONG.

Sworn and subscribed before me this 28th day of September, 1887.

——— ———,
Clerk Superior Court.

19 *Certificate of Clerk.*

I, Z. F. Long, clerk superior court, Richmond county, do hereby certify that the foregoing is a full, true, and perfect transcript of the record of said court in the case of D. M. Morrison, plaintiff, against John G. Watson, defendant.

In witness whereof I hereunto attach my name and my official seal, at office, in the town of Rockingham, this 1st day of February, 1888.

——— ———,
Clerk Superior Court.

Transcript was filed and the case docketed in the supreme court February 3, 1888.

Proceedings for Writ of Certiorari.

To D. M. Morrison, plaintiff.

SIR: You will take notice that on Wednesday, the 25th day of April, 1888, we will move before the supreme court of this State for a writ of certiorari, to the end that the case for the supreme court may be properly certified to that court.

(Signed) BURWELL & WALKER AND
TILLETT & LE GRAND,
Att'ys for Defendant.

Endorsed: "Service accepted. John D. Shaw & Son, att'ys for plaintiff."

Petition of defendant respectfully shows to the court that the plaintiff, appellant, in this case served a case on appeal on defend-

ant's counsel, to which the defendant filed exceptions, as required by the statute; that in the case so served by the plaintiff the testimony of John B. Covington, one of the defendant's witnesses, was correctly stated as follows: "JOHN B. COVINGTON, a witness for defendant, testified that he knew the Watson home place in June, 1879. The 18-acre tract was then worth $5 per acre. The 100-acre tract was worth $5 per acre or more. I bought land like
20 this in 1868 at these prices, and this land was worth more than that in 1879."

That there was no exception taken to this statement of said Covington's testimony; that the judge, after allowing some of the defendant's exceptions and amending the case accordingly, certified to it as the case settled for the supreme court, the said case containing the evidence of said Covington, as above set forth; that the judge then took the said case for the purpose of copying the same, and in the copy so made by him, which is the case sent to this court, the evidence of said Covington varied from the statement thereof in the original case in the particulars which will appear by reference to the case as docketed here. The petitioner is ready to produce the original case as settled and signed by the judge when so required by the court; that the statement of the evidence above made agrees with that contained in the judge's notes taken at the trial, which notes the defendant is ready to produce when so required by this court; that when the defendant discovered the error in the statement of said evidence the defendant's counsel wrote to Hon. H. G. Connor, who tried the cause, calling his attention to the error, and received a reply from him, in which he admits the error and states that he will make the correction if empowered to do so. The said reply is hereto annexed as a part of this petition and is in the following words:

"In reply to your letter in regard to Morrison *v.* Watson I would say that I remember very distinctly the testimony to which you called my attention, and will make the correction as you desire. I suppose that it can be done only in response to a certiorari, except by consent.

"Very truly, &c.,

"(Signed) H. G. CONNOR."

P. D. Walker and C. W. Tillett, being each duly sworn, say that they were attorneys for defendant in the trial of this cause
21 in the court below, and that they are acquainted with the facts set forth in the above petition, and that the same are true to the best of their knowledge, information, and belief.

(Signed) P. D. WALKER.
C. W. TILLETT.

Sworn and subscribed before me Apr. 24th, 1888.

(Signed) THOS. S. KENAN, *S. C. C.*

Endorsed: "*Per curiam:* Let the writ issue, to the end that the judge, if he thinks proper so to do, may make the correction. (Signed) Davis, J."

The writ accordingly issued on April 28th, 1888, and was returned September 7th, 1888, as follows:

"In obedience to the writ of certiorari to me directed by the supreme court in the above-entitled action, I return and certify the following as the case on appeal in said action settled by me upon further consideration.

"(Signed) H. G. CONNOR,
"*Judge Superior Court.*"

This was a civil action for the recovery of land, heard before Connor, judge, and a jury at the September term, 1887, of Richmond superior court. The plaintiff claimed title to the land described in the complaint by virtue of an execution sale and sheriff's deed made pursuant thereto. The defendant denied that the plaintiff was the owner of the land or that he wrongfully withheld possession thereof. He admitted being in the possession. The following issues were without objection submitted to the jury:

1. Is the plaintiff the owner and entitled to the immediate possession of the land described in the complaint?

2. Did the defendant at the time of bringing this action unlawfully withhold possession thereof?

3. What damages is the plaintiff entitled to recover?

The plaintiff put in evidence a deed from Z. F. Long, 22 sheriff, to himself for the land in controversy, dated Aug. 26th, 1882, and duly recorded. The said deed purported to convey the land in dispute; also one hundred and sixty acres in addition, made up of one tract of one hundred acres, one of fifty acres, and one of ten acres.

The plaintiff also showed in evidence a judgment rendered at spring term, 1870, of the superior court of Richmond county in favor of S. P. Cooper and R. S. Ledbetter, executors of Stephen Pankey, deceased, against Thomas Watson, Peter Hanner, and John G. Watson for $35 ($35), with interest on the same from the 13th day of November, 1864, and the costs, docketed May 17th, 1870. Executions were regularly issued thereon until October 4, 1873. On the 20th day of October, 1873, the said judgment was transferred to Z. B. Moore. On the 2nd day of April, 1879, leave was given the plaintiff in said judgment to issue execution, and on April 5th, 1879, an execution was duly issued thereon. The same was duly levied upon the lands in controversy, as will more fully appear by reference to the copy of said execution set out above. The sheriff proceeded on the 9th of January, 1879, to sell the said land, when the same was purchased by Z. B. Moore for the sum of $40, as appears from his endorsement on said execution, which is as follows: "9th June, 1879.—Sold the lands at court-house door to the highest bidder, when and where Z. B. Moore became the last and highest bidder at the sum of $40 and transferred his bid to D. M. Morrison. This return made *nunc pro tunc* by order of court. (Signed) Z. F. Long, former sheriff of Richmond county. 12th Dec., 1882."

On the same day he transferred his bid to the plaintiff. He also transferred the said judgment to the plaintiff. The plaintiff showed

in evidence the judgment-roll in the aforesaid judgment, including the note upon which the same was founded, executed by
23 Thomas Watson, Peter Hanner, and the defendant, John G. Watson, for $111, dated Nov. 13th, 1863, and due 12 months after date. Plaintiff also showed in evidence a judgment in favor of Frank Sandford against John G. Watson, dated June, 1876, for $15.85, interest from May 6th, 1860, upon which execution issued January 6th, 1879. No homestead was ever allotted to the defendant.

The plaintiff, for the purpose of showing that the lands of the defendant were, in January, 1879, worth less than $1,000, and the amount of the judgment, after objection by defendant and exception to its admission, introduced W. J. EVERETT, who testified that he knew the land formerly owned by John G. Watson, Sr., but did not know the dividing line. He knew where the dwelling was; also the twenty acres; that in June, 1879, in his opinion, from three to four dollars per acre was a fair valuation. He could not say as to the eighteen acres. The whole tract contained two hundred and twenty-seven acres. In respect to the one hundred acres he only knew its value by comparison with other similar tracts in the neighborhood; had not been on it; could not say how long before 1879 he last saw the land.

The plaintiff proposed to ask the witness the value of the one hundred acres. Objected to by the defendant because the witness states that he cannot give the value of the land except by comparison with other tracts in the neighborhood. Objection sustained. Plaintiff excepted.

W. A. MCKAY said that he knew the land in June, 1879; it was then worth from $1.50 to $2.00 per acre; the fifty-acre tract was worth the same; the ten-acre tract was worth $1.00 per acre.

H. H. COVINGTON said that he knew the land in June, 1879; has known it all of his life; the twenty-acre tract was worth in
24 June, 1879, $3.00 per acre; the eighteen acres, from $2.50 to $3.00 per acre; the twenty-five acres, from $3.00 to $3.50 per acre; the thirty-five-acre tract, from $2.50 to $3.00 per acre.

H. B. MCCORMACK said that he knew the land in June, 1879; the one hundred acres was worth from $1.00 to $1.50 per acre; the fifty-acre tract was worth about the same.

The plaintiff then offered a deed from the defendant, John G. Watson, to Flora Watson, dated April 6th, 1867, for the land in controversy; consideration set out, $1,200. Plaintiff then offered to show that the deed was fraudulent. Objected to by defendant as irrelevant. Objection sustained. Plaintiff excepted.

The defendant, upon the question as to the value of the land, introduced JOHN F. HANNER, who, after objection by plaintiff, testified that he knew the land of the defendant which is described in the sheriff's deed. The part around the house, ten or twelve acres, was worth in June, 1879, $5.00 per acre.

JOHN B. COVINGTON, a witness for defendant, testified that he knew the Watson home place in June, 1879. The eighteen-acre tract was then worth $5.00 per acre. The one-hundred-acre tract was worth

$5.00 per acre or more. I bought land like this in 1868 at these prices, and this land was worth more than that in 1879.

W. W. GRAHAM said that he knew the house place; that in June, 1879, it was worth $5.00 per acre; the twenty-two, the twenty-five, and the thirty-five acre tracts were worth $5.00 per acre; the one-hundred-acre tract was worth about $2.50 to $3.00 per acre.

The plaintiff then introduced —— TOWNSEND, who said that the one hundred acres and the fifty acres were worth in June, 1879, two dollars per acre.

25 The defendant duly objected to all of the testimony in regard to the value of the land when it was offered, for that the defendant's right to a homestead and the value of his land could only be ascertained and determined in the manner provided by law and not in the first instance by a jury empanneled to try the question of title. The court, in deference to the opinion of the supreme court in this case, admitted the testimony. Morrison *v.* Watson, 95 N. C., 479.

The counsel for the plaintiff requested the court to charge the jury—

1. That there was no evidence that the defendants were worth in June, 1879, one thousand dollars and the judgment, interest, and costs, amounting to $83.

2. That upon the whole evidence the plaintiff was entitled to recover.

The court declined to so instruct the jury, and the plaintiff excepted. The court then instructed the jury that they could consider the whole evidence, and after ascertaining the value of the land per acre in June, 1879, they should make a calculation as to its total value. The court then explained to the jury the issues and the way in which the testimony should be considered with respect to them, and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed, and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than one thousand dollars and the amount of the judgment, interest, and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment. (Miller *v.* Miller, 89 N. C., 402.)

26 The jury found the first and second issues in the negative; motion for a new trial for reception of the evidence objected to, and for refusing the instruction asked, and for error in the instruction given; motion denied; judgment in accordance with the verdict; appeal by plaintiff.

The clerk of the superior court of Richmond county is ordered and directed to file in his office the foregoing return to the writ of certiorari issued to me in the case of D. M. Morrison *vs.* J. G. Watson, and to transmit a certified copy or transcript of said return and of this order, under the seal of his court, to the supreme court this 3rd day of August, 1888.

I, Z. F. Long, clerk of the superior court of Richmond county, do hereby certify that the foregoing is a true and perfect copy of the case settled on appeal by H. G. Connor, judge, and filed in this office; also execution as referred to in above case.

Witness my hand and official seal, at office, in Rockingham, N. C., this 4th day of September, 1888.

(Signed) Z. F. LONG,
Clerk Superior Court.

The case was argued on November the 7th, 1888, by J. D. Shaw, for the plaintiff, and P. D. Walker and C. W. Tillett, for the defendant, and on November 12th the following opinion was delivered:

SMITH, *C. J.:*

The plaintiff derives title to the land he seeks in this action to recover under a sheriff's sale and deed of conveyance by virtue of a judgment rendered in favor of the executors of Stephen Pankey against the defendant, John G. Watson, and two others on a debt of $35.00, contracted in November, 1864, with interest thereon
27 from the 13th day of that month. The judgment was rendered before a justice of the peace of Richmond county and docketed in the superior court on May 17th, 1870. The judgment having become dormant, leave to issue execution was obtained in an application to the clerk on April 2nd, 1879. Executions thereupon issued on the 5th day of said month, and the sheriff, pursuant thereto, levied on and sold said lands, as the property of the defendant, to Z. B. Moore, to whom the judgment had been assigned, for the sum of $40.00, and he having assigned his bid to the plaintiff, the deed for the lands was made by the officer to the latter.

The sheriff also had in his hands an execution issued upon a judgment rendered in favor of one Frank Sandford for $15.85, with interest from May 6th, 1860, against the defendant.

No homestead was allotted to the defendant in the course of these proceedings, and to the present action he opposes the defence that without an allotment of his exemption, notwithstanding the debt antedated the constitution, in order that the debt might be satisfied from the excess, if sufficient remained to discharge it out of the land in exoneration of the homestead, the sale was illegal and the deed did not divest the title.

This contention finds support in the ruling of the court, though not unanimous, upon the point in the elaborately argued and carefully considered case of McCanless *v.* Flinchum, 98 N. C., 358.

While it is conceded that under the Constitution of the United States, as construed and applied to the exemption enactment, a debt previously created and before the State constitution was adopted must be paid out of the debtor's estate and the exemption must give way when it cannot be otherwise satisfied out of the debtor's
28 property (Edwards *v.* Kearzy, 96 U. S., 595), yet the debtor possesses still the right to retain exempt from sale, even at the instance of such a creditor, whatever excess there may be in his hands after the disposition of so much as may be needed to discharge

the debt, and to have an inquiry made, in the mode prescribed by law, to have the fact ascertained previous to the sale. Should the sale of the part estimated to be sufficient turn out not to be sufficient the creditor may then have recourse also to the part assigned as exempt. Code, sec. 502 *et seq.*

The debt must be paid at all events, but the method of proceeding in appropriating the property liable is a matter of legislative regulation.

Were it an open question it might admit of doubt whether this must not be done in all cases by the assessors, as the statute provides, to render valid the enforcement of the process in the sheriff's hands and before he undertakes to sell the real estate, instead of instituting such an inquiry before the jury in an action to establish title and recover possession of premises thus sold; but it has been held that when the real estate is manifestly deficient and it shall so appear afterwards such sale will be upheld upon the ground that no harm has come or could come to the debtor by reason of an omission to have a proceeding to ascertain if any homestead could be secured, and therefore it would have been useless and without detriment to the debtor. It is thus held in Miller *v.* Miller, 89 N. C., 402. See Arnold *v.* Estes, 92 N. C., 162; Loudermilk *v.* Corpening, *ib.*, 333, and other cases to same import.

In Littlejohn *v.* Egerton, 76 N. C., 468, the homestead had been set apart, but ineffectually, because not assigned by metes
29 and bounds, as prescribed by the statute, and the defendant, claiming under the sheriff's deed a full estate in the land, had come into possession and refused to admit the exemption. The court, recognizing the right of homestead, but unable to restore possession to the plaintiffs, suspended further action in the case until the plaintiffs could in the regular way have their exemption ascertained and set apart, giving them leave, on filing a certified copy of the allotment, to move for a writ of possession. The interruption in the progress of the cause grew out of the want of power in the court to have this done under its direction and the necessity of pursuing the statutory requirements to secure the full benefit of the constitutional provision.

So, if the parties in this case occupied to each other similar instead of reversed relations, it would be safe to pursue the same course and thus enable the debtor to regain his lost possession in furtherance of his legal right to retain possession until the sheriff, after causing his homestead to be ascertained and its boundaries fixed, should make sale under his execution. Such is not the case before the court, but the plaintiffs seek to dispossess the defendant by virtue of the deed of the sheriff, who sold, as the record shows, a large body of land to satisfy an inconsiderable debt, disallowing any right of homestead or any proceeding to find out whether the value of the land was not sufficient both to satisfy the debts and leave some portion to the debtor.

It has been repeatedly declared and, after an elaborate and exhaustive examination of the subject in separate opinions, settled by a majority of the members of the court in McCanless *v.* Flinchum,

already cited, that without regard to the time of origin of the
30 debt the provisions of the statute for laying off the homestead must be observed, because the debtor has a right to the exemption if the debt can, with costs, be satisfied out of other lands, and to this end the assessors should allot within the prescribed limits so much as in their judgment is not needed to pay the judgment, subject, however, to the creditor's right to have the exempted part sold also if the other on such sale proves insufficient and the debtor fails in any way to provide for the unpaid residue. In the case referred to Merrimon, J., uses this language: "The court ought to have instructed the jury to enquire particularly whether or not the land in question was worth more than the debt of the execution creditor and the costs, including the costs of laying off the homestead of the execution debtor, and if they found that it was, then the plaintiff could not recover, because it appeared that the homestead had not been laid off as the law required, and in that case the sheriff had no sufficient authority to sell the land, and therefore his deed to the plaintiff was void."

Many witnesses were examined in reference to the value of the land at the time of the execution sale; to the reception of whose evidence, offered by the plaintiff, the defendant objected. To this exception to the course taken by the court we have only to say that it has the sanction of the case from an opinion in which we have already quoted a part. The force of the objection to the witness Everett, first examined, being allowed to put an estimate upon the land based upon the value of other tracts in the neighborhood is not apparent, for we do not see how otherwise, unless upon an actual sale of the lands themselves, any reliable estimate could be arrived
at. This must, of course, rest upon the valuation given other
31 similar lands irrespective of the effect of improvements. The references to Warren *v.* Makely, 85 N. C., 12, and Bruner *v.* Threadgill, 88 N. C., 361, do not sustain the exception. In the first an inquiry as to the price brought upon a sale of an adjoining tract some twelve months before, simply made in this form and with no intimation of further evidence of the similarity of their condition or of any particulars that enter into an estimate of value, was ruled out. Similar proof was offered in the other case of the value of a town lot opposite to that whose value was the subject of inquiry and was rejected as incompetent. Neither goes so far as to deny to a witness the expression of an opinion of the value of certain lands founded upon the general value of other lands near thereto, for this is usually a safe, if not the only, guide to the formation of a reliable opinion as to the value of that in controversy.

The issues submitted to the jury are the first three of those passed on at a former trial, omitting the fourth, and which will be found in the case as reported in 95 N. C., 479, which were suggested in the opinion then delivered.

With the evidence before the jury as to the valuation in 1879, "the counsel of the plaintiff requested the court to chare the jury: 1. That there was no evidence that the defendants were worth in June, 1879, one thousand dollars and the judgment, interest, and

costs, amounting to eighty-three dollars. 2. That upon the whole evidence the plaintiff was entitled to recover. The court declined to so instruct the jury, and the plaintiff excepted. The court then instructed the jury that they could consider the whole evidence, and after ascertaining the value of the land per acre in June,
32 1879, they should make a calculation as to its total value. The court then explained to the jury the issues and the way in which the testimony should be considered with respect to them, and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed, and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than one thousand dollars and the amount of the judgment, interest, and costs, amounting to eighty-three dollars, and that the defendant had no other property which could have been sold to pay the judgment. (Miller *v.* Miller, 89 N. C., 402.) The jury found the first and second issues in the negative; motion for a new trial for reception of the evidence objected to, and for refusing the instruction asked and for error in the instruction given. Motion denied. Judgment in accordance with the verdict. Appeal by plaintiff."

The instructions demanded and declined proceed upon a misapprehension of the point of inquiry, which is not whether a full homestead of one thousand dollars could be taken from the land and then enough left to satisfy the judgment, interest, and costs, amounting to eighty-three dollars, but how much would remain for the use of the debtor after the discharge of the execution. For if he could not get the full measure of the exemption the debtor would still be entitled to what was not required after providing for such payment. So the issue was not what is implied in the instruction requested, but would the debtor have any land left after satisfying the debt, and, if so, it should have been ascertained and assigned, the neglect to have which done before the sale renders the same void, and hence the plaintiff is not the owner.
33 Such is the response of the jury to the question of the plaintiff's title and right to recover possession. The refusal to give the second instruction was also proper, for there was evidence to warrant the negative answer returned by the jury. The charge given is obnoxious to no just complaint of the plaintiff, for it requires him to show that the lands were worth less than one thousand dollars, the maximum allowed for the homestead increased by the debt, interest, and cost. It is based upon the erroneous idea that the debtor is only entitled to the exemption when he can get the full measure of the allowable value, while he is entitled to a fractional part of less value, if there be such excess over the demands of the writ, as truly as he would be to the larger quantity if it were sufficient to give him more without interference with the collection of what sum the demand requires. This, however, was favorable to the plaintiff and injurious only to the defendant. It is equally imperative that the debtor have exempt the excess, whatever it

might be, and a part as well as the whole. There being no suggestion of the defendant's owning other lands, we understand that there were none other than those mentioned in the case. The exceptions to the charge *is* general, pointing out no specific errors committed, and could not be for this reason noticed in the appeal. We refer to this case as reported in 95 N. C., 479, and to Miller *v.* Miller, 89 N. C., 402, in further elucidation. There is no error, and the judgment is affirmed.

Judgment.

This cause came on to be argued upon the transcript of the record from the superior court of Richmond county; upon consideration whereof this court is of opinion that there is no error in the record and proceedings of said superior court.

34 It is therefore considered and adjudged by the court here that the opinion of the court as delivered by the Honorable W. N. H. Smith, chief justice, be certified to the said superior court, to the intent that the judgment be affirmed; and it is considered and adjudged further that the plaintiff, D. M. Morrison, and surety, A. M. Long, do pay the costs of the appeal in this court incurred, to wit, the sum of $12.20, and let execution issue therefor.

(Signed) THOS. S. KENAN, *S. C. C.*

I, Thomas S. Kenan, clerk of the supreme court of the State of North Carolina, do hereby certify the foregoing to be a full, true, and correct transcript of the action entitled D. M. Morrison against J. G. Watson, as appears of record in this court. In witness whereof I have hereto set my hand and affixed the seal of said court, at office, in Raleigh, this the 30th day of August, 1890.

[Seal of the Supreme Court of the State of North Carolina.]

THOS. S. KENAN, *S. C. C.*

[Endorsed:] Morrison *v.* Watson. North Carolina supreme court.

Endorsed on cover: Case No. 14,143. North Carolina supreme court. No. 177. Daniel M. Morrison, plaintiff in error, *vs.* John G. Watson. Filed September 12, 1890.

154-177

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 177.

DANIEL M. MORRISON, PLAINTIFF IN ERROR,

vs.

JOHN G. WATSON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

Brief for Plaintiff in Error.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Plaintiff in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

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STATEMENT.

This was a civil action in the nature of ejectment brought by Morrison against Watson in the superior court of Richmond county for the possession of four certain parcels of land. Morrison based his claim of title upon a sheriff's deed conveying the property to him. At the trial he exhibited in evidence the judgment-roll upon which the levy and sale of the sheriff in question was founded, from which it appeared that Watson was in default upon a promissory note which had matured long prior to April 24, 1868. Watson admitted being in possession of the land and denied plaintiff's right to eject him therefrom.

At the trial it appeared that he relied upon a supposed invalidity of the sheriff's deed to Morrison caused by the failure to allot to him out of said lands prior to the levy and sale, a homestead, in accordance with the provisions of the State constitution and the acts of the legislature in aid thereof. Such provisions are as follows:

Constitution (ratified by the people April 21, 22, and 23, 1868) in force April 24, 1868 (Laws 1868–'69, p. 34).

ARTICLE X, SEC. 2:

"Every homestead, and the dwelling and buildings used therewith, not exceeding in value one thousand dollars to be selected by the owner thereof, or in lieu thereof, at the option of the owner, any lot in a City, Town or Village, with the dwelling and buildings used thereon, owned and occupied by any resident of this State, and not exceeding the value of one thousand dollars, shall be exempted from sale under execution, or other final process, obtained on any debt. But no property shall be exempt from sale for taxes, or for payment of obligations contracted for the purchase of said premises."

SEC. 4. The provisions of section * * * two of this Article shall not be so construed as to prevent a laborer's lien for work done and performed for the person claiming such exemption, or a mechanic's lien for work done on the premises."

An act of the legislature, ratified April 7, 1869 (Laws 1868–'69, p. 331 *et seq.*), provided the machinery for enforcing this constitutional provision as follows:

SECTION 1. Homestead, when and how exempted:

Whenever the real estate of any resident of this State shall be levied on, by virtue of any execution or other final process obtained on any debt, such portion thereof as may be occupied by the owner as an actual homestead, and which he may then elect to regard as such, including the dwelling and buildings thereon, shall be exempt from such levy, except under an execution or other final process issued for the collection of a debt contracted:

1. For purchase of said homestead;

2. For such work and labor done for the owner of the homestead as may constitute a laborer's lien;

3. For such labor done on the premises as may constitute a mechanic's lien;

4. For taxes accruing on said homestead.

SEC. 2. Sheriff to summon appraisers:

Before levying upon any homestead thus owned and occupied, the sheriff or other officer charged with such levy, shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A B, do solemnly swear (or affirm) that I have no interest, near or remote, in the homestead exemption of C D, and that I will faithfully perform the duties of appraiser (or assessor, as the case may be) in valuing the laying off of the same. So help me God."

SEC. 3. Duty of appraisers:

The said appraisers shall thereupon proceed to value the homestead, with its dwelling and buildings thereon, and lay off to said owner such portion as he may select, or any agent, attorney, or other person in his behalf, not exceeding in value one thousand dollars, and to fix and describe the same by metes and bounds.

SEC. 4. Appraisers to make return:

They shall then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment-roll in the action, and a minute of the same entered on the judgment docket.

SEC. 5. The levy to be made on the excess:

The levy may be made upon the excess of the homestead, not laid off according to the provisions of this act, and that the officer shall make substantially the following return upon the execution: "A B, C D, and E F summoned and qualified as appraisers or assessors (as the case may be), who set off to X Y, the homestead exempt by law. Levy made upon the excess."

SEC. 6. Appraisers to elect:

In case no election is made by the owner, his agent, or atney, or any one acting in his behalf, of the homestead, to be laid off as exempt, the appraisers shall make such election for him, including always the dwelling and the buildings used therewith.

* * * * * * *

SEC. 16. Costs, how charged:

The cost and expenses of appraising and laying off the homestead or personal property exemptions, when the same is made under execution shall be charged and included in the officer's bill of fees upon such execution or other final process; and when made upon the petition of the owner they shall be paid by such owner, and the latter cost shall be a lien on said homestead.

SEC. 17. Liability of officer:

Any officer making a levy, who shall refuse or neglect to summon and qualify appraisers as heretofore provided for, or who shall fail to make due return of their proceedings, or who shall levy upon the homestead set off by said appraisers or assessors, (as the case may be), except as herein provided, shall be liable to indictment for a misdemeanor, and he and his sureties shall be liable to the owner of said homestead for all costs and damages in a civil action.

* * * * * * *

SEC. 23. Cost of reassessment, how paid.

If the board of trustees shall confirm the former appraisal or shall increase the exemption allowed the judgment debtor, the levy shall stand only upon the excess remaining, and the judgment creditor shall pay all costs of the reallotment. If they shall reduce the amount allowed the judgment debtor, the costs shall follow the execution, and the levy shall cover the excess then remaining.

The judgment debt against Watson, together with interest and costs, amounted to $83. The land in dispute at the sheriff's sale was purchased for $40.00. There is no allegation of fraud or collusion on the part of any one connected with the sale, nor does it appear that the defendant at any time prior to the sale offered to pay the amount due.

At the trial below testimony was introduced by the defendant tending to show that at the time of the levy and sale the lands in question were worth more than $1,000 and the judgment debt with interest and costs.

Counsel for plaintiff requested the court to charge the jury:

(1.) That there was no evidence that the defendants were worth in June, 1879 (the date of sheriff's sale), one thousand dollars and the judgment, interest, and costs, amounting to $83.'

(2.) That upon the whole evidence the plaintiff was entitled to recover."

The court declined so to instruct the jury and the plaintiff excepted. (R., p. 15.)

The court then proceeded to instruct the jury that they could consider the whole evidence, and after ascertaining the value of the land per acre in June, 1879, they could make a calculation as to its total value, * * * and instructed them that they could consider the return on the execution in passing upon the question whether the defendant had other property than the land covered by the sheriff's deed, *and that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than one thousand dollars, and the amount of the judgment, interest, and costs, amounting to $83, and that the defendant had no other property which could have been sold to pay the judgment.*" (R., p. 15.)

The jury found in favor of the defendant, and plaintiff moved for a new trial, because of (*a*) the admission of the evidence objected to, (*b*) the refusal of the instructions asked, and (*c*) for error in the instruction given.

This motion was overruled and a judgment entered in accordance with the verdict. (R., p. 15.)

Upon appeal the supreme court of the State sustained the rulings of the lower court and held that, notwithstanding the fact that—

"Under the Constitution of the United States, as construed and applied to the exemption enactment, a debt previously created *and* before the State constitution was adopted must be paid out of the debtor's estate, and the exemption must give way when it cannot be otherwise satisfied out of the debtor's property (Edwards *vs.* Kearzy, 96 U. S., 595); yet the debtor possesses still the right to retain exempt from sale, even at the instance of such a creditor, whatever excess there may be in his hands after the disposition of so much as may be needed to discharge the debt, *and to have an inquiry made in the mode prescribed by law to have the fact ascertained previous to the sale.* Should the sale of the part estimated to be sufficient turn out not to be sufficient the creditor may then have recourse also to the part assigned as exempt" (R., pp. 16, 17), and, further, "that without regard to the time of origin of the debt the provisions of the statute for laying of the homestead must be observed, because the debtor has the right to the exemption if the debt can, with costs, be satisfied out of other lands, and to this end the assessors should allot within the prescribed limits so much as in their judgment is not needed to pay the judgment, subject, however, to the creditor's right to have the exempted part sold also if the other on such sales proves insufficient and the debtor fails in any way to provide for the unpaid residue." (R., pp. 17, 18.)

ASSIGNMENT OF ERRORS.

1.

The contract which resulted in the sale of the lands in controversy to Morrison having been entered into prior to the adoption of the State constitution and the statutory enactments in aid thereof, it was error to decide that the said sale should have been made in accordance with their provisions, the plain effect of which was to impair the obligation of the contract.

2.

The trial court should have instructed the jury that upon the whole evidence the plaintiff was entitled to possession of the lands.

3.

It was error to instruct the jury that to recover in this action the plaintiff must show by a preponderance of the testimony that the defendant's land was worth in June, 1879, less than one thousand dollars and the amount of the judgment, and that the defendant had no other property which could have been sold to satisfy the latter.

ARGUMENT.

The supreme court of North Carolina, in the case of *Long* vs. *Walker* (105 N. C., 90), has reviewed at length the decision in the case here at bar and expressly overruled the principles announced therein.

The decision, therefore, is no longer authority in the State whence it came, and the only justification for forcing it upon the attention of this Court is that it is impossible otherwise to right the individual wrong which has been thereby imposed upon the plaintiff in error.

Although Long *vs.* Walker (*supra*), upon the Federal

question involved in this case, cannot be cited as authority, nevertheless we refer to the able argumentation therein as most persuasive.

When the contract, in satisfaction of which the land in controversy was sold, was made, the creditor was entitled, in the event of default, to levy execution upon the lands as well as the personal property, with insignificant exemptions of the latter class, of the debtor. There was then no such thing as a "homestead" exemption, nor was the sheriff embarrassed in levying execution and making sale by any unusual or peculiar restrictions. If need be the whole body of the debtor's land might be sold to satisfy the debt, and this subject only to the requirement that due notice of the time and place of sale should be given.

Rev. Code N. C., ch. 45, secs. 1 and 2.

Long *vs.* Walker, 105 N. C., 90, 99.

The act of April 7, 1869 (*supra*), makes it obligatory upon the sheriff, before levying upon any homestead, to summon three discreet persons to appraise the same and lay off a certain "homestead" exemption in the act provided for. It then confines the levy to the excess, the burden of the costs and expenses of such proceedings being upon the judgment creditor in the first instance, and in the event of the lands being insufficient to satisfy both the debt and the costs and expenses remaining with him always. Instead of enjoying the speedy and unrestricted remedy against the debtor's property which existed prior to 1868, the court below has so construed and applied this statute as to confine creditors to the circuitous and expensive method pointed out in its opinion, and in this particular instance has denied to Morrison the benefit of his purchase because such method was not followed out by the sheriff, and this notwithstanding the fact as above stated that the debt which resulted in the sale was incurred in 1864.

To require creditors to submit to exactions and conditions not in contemplation of the parties or of the law existing when the contract was made, of necessity diminishes the value of the contract in the ratio of the risk, cost, delay and annoyance attendant upon the newly prescribed method of collection. To such extent is the obligation of the contract impaired.

It is a matter of no consequence that the enactments in question operate upon the remedy and not directly upon the contract itself. They are none the less obnoxious to the Federal Constitution (art. 1, sec. 10).

McCracken *vs.* Hayward, 2 How., 608, 612.
Von Hoffman *vs.* Quincy, 4 Wall., 552.
White *vs.* Hart, 13 Wall., 646.
Seibert *vs.* Lewis, 122 U. S., 284, 294.

And they gain no additional dignity or strength because foreshadowed in the State constitution.

White *vs.* Hart (*supra*).
Gunn *vs.* Barry, 15 Wall., 610.
Fisk *vs.* Police Jury, 116 U. S., 1311.

That the provisions of Art. X of the constitution of North Carolina and also of the acts passed in pursuance thereof are not applicable to debts incurred and contracts created prior to April 24, 1868. is no longer an open question. As to such debts and contracts they are as if they never had been passed. So this Court has expressly decided in—

Edwards *vs.* Kearzey, 96 U. S., 595, 604.

Upon the authority of that case it is submitted that the judgment here in question should be reversed.

S. F. PHILLIPS,
F. D. MCKENNEY,
Attorneys for Plaintiff in Error.

DECEMBER, 1893.

134-171

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 177.

DANIEL M. MORRISON, *Plaintiff in Error*,

vs.

JOHN G. WATSON.

BRIEF.

FILED BY

W. W. FLEMING,
of Counsel for Appellee.

Law Reporting Printing Co.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 177.

DANIEL M. MORRISON, *Plaintiff in Error,*

vs

JOHN G. WATSON.

BRIEF.

There is no Federal element involved in this cause.

The substitution of a new remedy is not within the inibition of Article 1, Section 10, of the Constitution of the United States.

Additional costs, unless unreasonable, do not impair the remedy.

The defendant submits that this cause should be dismissed.

First. For that this court is without jurisdiction, there being no Federal element involved in the controversy, the clause of the Constitution alleged to have been violated being a portion of Article 1, Section 10. "No state shall pass any * * * law impairing the obligation of contracts."

The court, where the original trial of this cause was had, eliminated any Constitutional question by instructing the jury "that to recover in this action the plaintiff must show by preponderance of the testimony that the defendant's land was worth in June, 1879, less than $1,083." This was in effect to say that the homestead was not to be allowed to the defendant in derogation of defendant's claim; in other words, that under the clause of the Constitution above cited, the plaintiff was vested with rights that could not be impaired by the constitution of the State, and that the statute of the State in so far as it came within the inhibition of the Constitution of the

United States, could not prevail. The court below and the court of last resort in the State, expressly and by implication, held that, as against the original debt, interest and cost of plaintiff, the exemption from execution allowed to defendants in execution could not be here sustained; hence, there appears nothing in the record of which this court can take judicial notice.

The defendant and the courts of the State have, in this cause drawn the distinction between a *right* and a *remedy*. Nor is it necessary to cite authorities for the well settled position, that while a State cannot by law impair the obligation of a contract the remedies for the enforcement of contracts are within the legislative control of the State.

> "The right to a particular remedy is not a vested right. * * * Every State may abolish one class of courts and create another. It may give a new and additional remedy for a right already in existence. And it may abolish old remedies and substitute new."
>
> Cooley on Constitutional Limitations, 3d Edition, 361.

> "It has been held that laws changing remedies for the enforcement of legal contracts will be valid, even though the new remedy be less convenient than the old or less prompt and speedy."
>
> Ibid., 287.
>
> Beers *vs.* Haughton, 9 Peters, 359.

The obligation of the contract is not impaired if a substantial remedy remains.

> Richmond *vs.* Richmond, &c., R. R. Co., 21st Grattan, 611.

It is nowhere denied that the plaintiff has a right to have his judgment enforced by the courts against the defendant's property even to the last foot, provided so much be neces-

sary to satisfy the judgment, interest, and cost. But, since it is not only the right but the solemn duty of States to exercise in the administration of its laws, a humane policy, and protect each citizen from unjust, harrassing, and oppressive execution of law, remedies are provided which will procure, and secure to the parties, the full and faithful performance of contracts, and at the same time avoid harshness, and they may be so regulated as not to threaten or destroy the well being of a community. Such, when properly understood, and upon right construction, are the legislative enactments of North Carolina, as construed by the courts in this case. In fact, the rights of creditors whose contracts were made prior to 1868, have been better secured under the new remedies subsequent to judgment than they were prior that date. Under the former law after the creditor obtained the judgment, it was no lien upon real estate. The enactments of that time (1868) not only give him a lien, upon the enrolment of his judgment, on all the land of the defendant, but upon all lands that he may acquire within the jurisdiction, and continues that lien for a period of ten years.

Sec. 435 N. C. Code of Civil Proceedure, 254.

Previous to 1868, the levy created the liens but when made, related to the test of the *fi. fa.*, but required renewals to continue the liens.

Hondue *vs.* Spivey, 8 Ired., 63 N. C.

Prior to 1868 the law required the execution to be *first* levied on the *goods* and *chattels* of defendant in execution

Sec. 2, Chap. 45, Revised code, N. C., and Sec. 1 of said chapter provides for execution in like manner against real estate.

What is the injury alleged? Or how does the act, as construed by the Supreme Court of North Carolina, impair

the obligation of a contract? It is alleged that under the law the jndgment creditor must first have the judgment debtor's homestead laid off, and this is an additional expense, and to that degree impairs the rights of the judgment creditor by increasing the indebtedness.

Chap. 137, Sec. 16, Laws of 1868–9, directs that the bill for laying off homesteads, if made for the purposes of execution, shall be charged in the officer's bill of fees. While this is not necessary to be done by the judgment creditor, if the quantity of real estate is so small, or the debt so large, that there will be nothing left for the judgment debtor; but when the reverse is true, by laying off the homestead, it enables the judgment creditor to have the homestead laid off, sell the excess, and if this is insufficient to pay the full judgment and costs, including the cost of laying off the homestead, the exemption so set apart is liable and may be sold to satisfy whatever of the judgment may remain unpaid, whether of principal or cost, and thus avoid any question as to the rights of the judgment debtor on his fund. These costs are insignificant, and the appellant fails to show or even to allege that such cost would to any appreciable degree offset his rights.

In Edwards *vs.* Kearney, 96 U. S., 595, the court says the act of the legislature must *materially* impair the obligation of the contract, lay stress upon the fact that in that case there was not enough to give the exemption and pay the debt. The jury find to the contrary in our case.

And on page 601. It is to be understood that the enactment thus denounced must be material. If it be not material, it will be regarded as of no account.

The following authorities, defendant submits, are sound, just, and reasonable. They secure to the judgment creditor his full rights, and at the same time preserve to the wife and children, dependent upon the judgment debtor, the residue, if there be any. It has been universally held by

the court of last resort in the State of North Carolina, that the homestead is not for the benefit of the debtor alone; but is a humane provision for his dependent family, in which they have a vested right.

Mebane *vs.* Layton, 89 N. C., 396.
Arnold *vs.* Estes, 92 N. C., 162.
McCanless *vs.* Flinchum, 98 N. C., 358.
McCraken *vs.* Adler, 98 N. C., 400.
Morrison *vs.* Watson, 101 N. C., 332.

W. W. FLEMMING,
Of Counsel for Appellee.

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154-116

IN THE

Supreme Court of the United States.

IN RE—BELVA A. LOCKWOOD.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Belva A. Lockwood, respectfully represents to your Honors that she is a licensed practitioner of law in the Courts of the District of Columbia and the Supreme Court of the United States, as well as in several States of this Union. That on the 29th day of March, A. D. 1894, she applied through her Counsel, Alfred E. Cohen, to the Supreme Court of Appeals of Virginia to be admitted to the practice of law in that Court and the said Court refused to admit her as a practitioner in that Court.

Your petitioner respectfully submits that under the Constitution of the United States and under the Statute Law of Virginia she had the privilege of practicing her profession in the Supreme Court of Appeals in the State of Virginia, and that said Court, in refusing her admission to its Bar, violated her most sacred rights and denied her one of the highest privileges known to the citizen.

The second section of Article Four of the Constitution of the United States declares as follows:

"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Now your petitioner most confidently and earnestly submits that she, though a woman, is a citizen of the United States, and the sacred ægis of the Constitution protects her just as if she were a man; she is certainly a citizen of the United States.

She further confidently submits that the practice of law is a privilege, and the highest privilege. Your Honors are now reaping the rewards and the honors of your high position from the privilege obtained from practicing the profession of law. You to-day occupy the highest position on this earth—higher even than that of President of this Republic, and higher, too, than the Chief Justice of England and the Associate Justices of the Supreme Bench—higher, because this is the greatest country and the grandest government on earth, and the Supreme Court of the United States is the highest Court in the civilized world.

While, therefore, your petitioner is a woman, there is nothing in the Constitution or laws of the United States, or in the statute law of Virginia, to prevent her from exercising this high and valuable privilege.

Nor is she probibited by the statute law of Virginia, for Section 3,192 is in these words: (Code of Virginia, 1887, p. 762)—

"WHO MAY PRACTICE LAW IN THIS STATE.—Any person duly authorized and practicing as counsel or attorney at law in any State or Territory of the United States, or in the District of Columbia, may practice as such in the Courts of this State."

Your petitioner respectfully submits, therefore, that, though a woman, she is still a person and a citizen, and is entitled, under the Constitution of the United States and statute law of Virginia both, to practice her profession in all the Courts of Virginia.

Your petitioner, therefore, prays this Court to issue a rule against the Supreme Court of Appeals of the State of Virginia, returnable at an early day, to show cause why a peremptory mandamus should not be issued against said Court, requiring and compelling that Court to admit your petitioner as a practitioner at its bar, and your petitioner will ever pray, &c.

BELVA A. LOCKWOOD.

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154-116

WASHINGTON CITY,
DISTRICT OF COLUMBIA, } ss:

This day personally appeared before me, Edward A. Paul, Sr., a Notary Public for said City of Washington, District of Columbia, Belva A. Lockwood, and made oath as follows: That on the twenty-ninth day of March, A. D. 1894, she appeared before the Supreme Court of Appeals of Virginia, and through her Counsel, Alfred E. Cohen, made application to said Court to be admitted as a practitioner of law in that Court, and that her application was rejected. That no reason was given for said rejection of her application, except the fact that she is a woman. And affiant further states that no record was made of such refusal upon the minute book of that day, and that, therefore, she cannot file with her petition a copy of the record, but she files in lieu thereof a certificate of the Clerk of said Court to the effect that her application to practice law in that Court was refused, which she files with her petition, and also this affidavit, so as to bring the whole question raised by her petition before this Court.

And said affiant further states that she has been a member of the Bar of the Supreme Court of the District of Columbia for more than twenty (20) years last past, and for more than fourteen (14) years a member of the Bar of the Supreme Court of the United States, and that she has been admitted to the Bar of the Supreme Court of the State of New York, and also to the Courts of other States in the Union.

IN WITNESS WHEREOF, Affiant has hereunto set her hand.

BELVA A. LOCKWOOD.

Sworn and subscribed before me, this 23d day of April, A. D. 1894.

EDWARD A. PAUL, SR.,
Notary Public, D. C.

154 S.116

Supreme Court of Appeals,

STATE OF VIRGINIA.

I George K. Taylor, Clerk of the Supreme Court of Appeals of Virginia, at Richmond, do hereby certify that Mrs. Belva A. Lockwood made application to said Court, at its March Term, 1894, to be allowed to practice law in said Court, and that the Court rejected her said application, but that no order was made at the time.

Given under my hand, this 18th day of April, 1894.

GEO. K. TAYLOR,
Clerk of Court.

154 U.S.

154-118

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES OF AMERICA, LIBELLANT AND APPELLANT,

v.

THE STEAMSHIP HAYTIAN REPUBLIC, HER ENGINES, BOILERS, TACKLE, APPAREL, AND FURNITURE, RESPONDENT, THE NORTHWEST LOAN AND TRUST COMPANY, CLAIMANT.

ON MOTION FOR WRIT OF CERTIORARI.

OPINION AND RECORD OF THE PROCEEDINGS IN THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

In the district court of the United States for the district of Oregon.

No. 3403. December 8, 1893.

The Steamship Haytian Republic, the United States, libellant, the Northwest Loan and Trust Company and J. L. Hartman, receiver thereof, claimants.

Now, at this day, comes the libellant herein, by Mr. John M. Gearin, special assistant United States attorney, and the claimants, by Mr. W. H. Gorham and Mr. O. F. Paxton, of counsel, and this cause comes on for hearing upon the motion filed herein by said claimants, based upon the affidavit of Mr. O. F. Paxton and upon a statement in writing made by Mr. C. A. Dolph and filed herein, which statement is agreed in open court by all the parties hereto shall be taken as true, to correct the entry heretofore made herein on the 26th day of July, 1893, so that said entry shall conform to the fact as shown by said affidavit and statement; and the court being advised in the premises, it is ordered that the said entry be corrected so as to read as follows:

"Now, at this day, comes the libellant, by Mr. John M. Gearin, special assistant United States attorney, and the claimants, by Mr. C. A. Dolph, Mr. W. H. Gorham, and Mr. O. F. Paxton, of counsel, and this cause comes on to be heard upon the exceptions to the original libel as amended and the supplemental libel herein; whereupon during the

hearing of said cause it was stated by counsel for the United States, and acquiesced in by counsel for the claimants, that the first count in the original libel herein as amended was drawn under a statute that had never taken effect, and that said count did not state facts constituting a violation of law; and the court, having heard the arguments of counsel as to the exceptions to other counts in said libels, will advise thereof.

(Signed) CHARLES B. BELLINGER,
Judge.

(Endorsed:) Filed Dec. 8, 1893. R. B. Lamson, clerk.

THE UNITED STATES OF AMERICA,
District of Oregon, ss:

I, R. B. Lamson, clerk of the United States district court for the district of Oregon, do hereby certify that the foregoing copy of order for correction of record, in cause No. 3403, The United States vs. The Steamship Haytian Republic, has been by me compared with the original, and that it is a correct transcript therefrom, and of the whole of such original as the same appears of record and on file at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this December 8, 1893.

[SEAL.] R. B. LAMSON, *Clerk.*
By G. H. MARSH,
Deputy Clerk.

(Endorsed:) No. 149. U. S. vs. Steamship Haytian Republic, etc. Filed Dec. 11, 1893. F. D. Monckton, clerk.

United States circuit court of appeals for the ninth circuit.

THE UNITED STATES
vs.
STEAMSHIP HAYTIAN REPUBLIC. } In admiralty.

Appeal from the district court of the United States for the district of Oregon.

Mr. John M. Gearin for the appellant; Messrs. Andros and Frank for the appellees.

Before McKenna and Gilbert, circuit judges, and Hanford, district judge.

OPINION.

GILBERT, circuit judge.

On the 6th day of June, 1893, the steamship Haytian Republic was seized for forfeiture by the United States in the district court of the U. S. for the district of Washington, for alleged violations of the revenue laws of the United States by smuggling and clandestinely introducing prepared opium, and for violation of the laws relating to the importation of Chinese laborers, committed between the 28th day of September, 1892, and the 28th day of May, 1893.

The vessel was thereupon claimed by her master and an appraisement was had upon the order of the court at the petition of the claimant, and upon the 9th day of June, 1893, the vessel was released upon the claimant's bond for her value as appraised, and she thereupon proceeded upon her business.

Upon the 3d day of July, 1893, at the port of Portland, Oregon, the vessel was again seized by the United States and a libel of information was filed by the United States attorney for forfeiture for acts set forth in the libel and other acts appearing. The acts charged in the libel

were of two classes: First, acts of a similar nature to those for which she was seized in the District of Washington and occurring prior to the date of her seizure there; second, acts in violation of the Chinese exclusion laws, committed subsequent to her release from the former seizure. The claimant answered, denying the charges of violation of the Chinese exclusion acts, but filed exceptions to the other counts of the libel, setting up in defence thereof the former seizure and the pendency of the proceedings for forfeiture in the district court for the district of Washington.

All of the exceptions were sustained by the court. Trial upon the issues raised by the answer resulted in a decree for the claimant. From the decree the U. S. brings this appeal, assigning as error the decision of the district court in sustaining the exceptions to portions of the libel. It is the appellant's contention that the pendency of the prior proceeding is no bar to the prosecution of the present suit for the reasons, first, that the causes of suit are not the same, since the acts charged in the libel in the district court of Oregon, while covering the same period as those charged in the libel in the district court of Washington, are nevertheless, distinct and separate therefrom; and second, that the former proceeding so pleaded is pending in a court of a different jurisdiction from the present proceeding and could not, therefore, be pleaded in bar of the latter even if the two causes of suit were the same. The decision of these questions brings under consideration the nature of the proceeding whereby the United States have seized this vessel for condemnation and forfeiture. The suit for forfeiture is a proceeding in rem. It can only be brought in the district court of the United States. The court of the district in which the seizure is had, acquires exclusive jurisdiction of the property seized. The release of the vessel upon the bond for value does not change the nature of the proceeding. The bond so given takes the place of the vessel and the court retains jurisdiction over the subject

matter of the suit to the same extent and with the same effect as if the vessel still remained in custody of the court. The stipulation for value is given in cases where suit is brought, not to enforce a partial lien or charge against the vessel, but to recover the property itself, or to sell the same as in the present case. The bond in such a case is a pledge or substitute for the property, "as regards all claims that may be made against it by the promoter of the suit." United States *v.* Ames, 99 U. S., 36. There can be no doubt that the United States, the promoter of the suit in the district of Washington, could have charged against the vessel all of the offences against the revenue and immigration laws that are included in the libel filed in the district of Oregon. Those offenses if not known to the libellant at the time of the seizure and filing the libel could have been added by new counts to the libel at any time before the final decree. Twenty-fourth Admiralty rule; the Marina Flora, 11 Wheat. 38. No authority is cited in which the question now before the court has been precisely decided. It was held in the court below that the jurisdiction acquired by the court first making the seizure is exclusive. It would seem from the nature of the proceeding that this must be so.

If the vessel remained in custody of the court first seizing the same, all litigation affecting it and all remedies of the United States for prior violation of its revenue, immigration, or navigation laws would be necessarily drawn into that court. The rights and remedies of the United States ought not to be enlarged from the fact that the vessel has been released upon claim made and bond given, so long as the United States have the bond for value upon which to satisfy its demands. In the case of United States *v.* Ames, 99 U. S. 42, the court said of such a bond: "It became the substitute for the property and the remedy of the libellants in case they prevailed in the suit in rem for condemnation was transferred from the property to the bond or stipulation accepted by the court as the substitute for the prop-

erty seized." There is authority for holding that in case of misrepresentation or fraud in obtaining the release of the vessel seized or where the order of release was improvidently given without proper knowledge of the real value of the vessel or without proper appraisement thereof, the vessel so released may be recalled before final decree in the court in which the seizure was had. "The Virgo, 13 Blatch., 255; The Union, 4 Blatch., 90; The Wanata, 95 U. S., 611." But there is no authority for holding that in the absence of such special ground for reviewing the order of release, the United States may in the same court or in any other court any way pursue or seize the vessel after she is so released, except for acts thereafter committed. A second seizure would clearly be oppressive and burdensome, and would be, as we hold, a departure from the general rules of procedure that obtain in proceedings in rem. The presence of the res in the court first seizing the same, draws to that court all litigation affecting it.

The doctrine of the case of the Langden Cheeves, 2 Mason, 59, cited by the appellants, is not perceived to be in conflict with this view or applicable to this case.

The question there before the court was whether upon seizure and release to the owner upon his bond a vessel became discharged of the liens for seamen's wages. The court held that after such release the vessel remained in the hands of her owner liable for all liens legally attaching to her. It may be conceded in the case before the court that the Haytian Republic, when released in the district of Washington, was not thereby discharged of existing liens created by operation of law or by the act of her owners.

It is contended that the exceptions should have been overruled, for the reason that the record filed in support of the same discloses the fact that no valid or legal bond was filed in the district court of Washington upon the release of the vessel therein. The defect in the bond con-

sists in the omission from the clause containing the condition of the obligation, the specified sum that shall be paid by the obligors in case of default. There is in the bond, however, a distinct obligation upon the part of the persons signing the same to pay a sum equal to the appraised value of the vessel, and we see no reason why a decree may not be taken against the stipulators for that amount. If the bond were fatally defective in form, as claimed, it would seem that that fact would not render the proceedings in the district court of Washington void, but would afford that court a reason for recalling the vessel or subjecting her to a second seizure in the same court, as indicated in the authorities cited above.

The decree is affirmed.

(Endorsed:) *Opinion.* Filed Dec'r 18, 1893. F. D. Monckton, clerk.

United States circuit court of appeals for the ninth circuit.

THE UNITED STATES, APPELLANT, vs. STEAMSHIP HAYTIAN REPUBLIC, etc.	No. 149. October term, 1893.

Appeal from the district court of the United States for the district of Oregon.

JUDGMENT OF AFFIRMANCE.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Oregon, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court, in this cause be, and the same is hereby affirmed, and the cause is remanded to said district court for such further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) No. 149. United States circuit court of appeals for the ninth circuit. October term, 1893. U. S. v. S. S. Haytian Republic, &c. Decree. Filed Dec. 18, 1893. F. D. Monckton, clerk.

At a stated term, to wit, the October term, A. D. 1893, of the United States circuit court of appeals, for the ninth circuit, held at the court room, in the city and county of San Francisco, on Monday, the eighteenth day of December, in the year of our Lord one thousand eight hundred and ninety-four.

Present, the honorable Joseph McKenna, circuit judge; honorable William W. Morrow, district judge.

THE UNITED STATES, APPELLANT,
vs.
STEAMSHIP HAYTIAN REPUBLIC, &c. } No. 149.

In above cause, on motion of N. H. Frank, esq., it is ordered that a mandate issue to the court below forthwith.

United States circuit court of appeals for the ninth circuit.

THE UNITED STATES, APPELLANT,
vs.
THE STEAMSHIP HAYTIAN REPUBLIC, &c. } No. 149.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one hundred and seventy pages to be a full, true, and correct copy of the entire record in the above-entitled cause in our said circuit court of appeals.

Attest my hand and the seal of said United States circuit court of appeals at San Francisco, this 20th day of February, A. D. 1894.

[SEAL.] F. D. MONCKTON, *Clerk.*

END OF ROLL

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+ 154-118

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, LIBELLANTS AND appellants,
vs.
THE STEAMSHIP HAYTIAN REPUBLIC, etc., and the Northwest Loan and Trust Company.
} No.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

START OF ROLL

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, LIBELLANTS AND appellants,
vs.
THE STEAMSHIP HAYTIAN REPUBLIC, etc., and the Northwest Loan and Trust Company.
} No.

PETITION FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

STATEMENT OF THE CASE AND PETITION.

The district court of the United States for the district of Oregon, and on appeal therefrom the circuit court of appeals for the ninth circuit, have decided in this case that the mere pendency in one district of a suit for forfeiture, where the vessel has been released on bail, is an absolute bar to a libel of forfeiture subsequently filed in another district for separate and distinct offenses committed prior to the filing of the first libel; in other words,

that where a vessel libeled for forfeiture in the district of Washington has been released on a stipulation for value, it is not competent for the United States to thereafter libel her in the district of Oregon for forfeiture on account of entirely separate and distinct offenses committed prior to the first libel, even supposing the offenses not to have been discovered when the first libel was filed. I admit that, since there can be but one *satisfaction*, an *adjudication* of forfeiture operates as a satisfaction of all grounds of forfeiture existing at the time of the adjudication, and that therefore an *adjudication* of forfeiture in either of the suits mentioned would be a bar to further proceedings in the other. But if the vessel were acquitted on the first suit, that would be no reason why she should not be tried and, if convicted, condemned for the separate and distinct offenses alleged in the second.

The judgment of the circuit court of appeals, which is the first judicial announcement of such a doctrine, is so far reaching in its consequences, so inconvenient and embarrassing to the Government as a precedent, and seems to be in such plain contradiction of the fundamental rule that a plea of former action pending, to be available, must aver the parties and the cause of action to be the same, that the Government feels warranted in asking the court to grant a writ of certiorari to bring the judgment up for review, pursuant to the provisions of section 6 of the act of March 3, 1891, c. 517.

The first count of the libel at bar as amended clearly charged an offense against the laws of the United States, which subjected the vessel to forfeiture under sections 2

and 10 of the act of May 6, 1882, c. 126, 22 Stat., 58, as amended by the act of July 5, 1884, c. 220, 23 Stat., 115, denouncing "attempts" to land Chinese laborers. But the counsel for the Government seem to have confessed the claimant's exceptions to the count, and I do not, therefore, propose to discuss it, nor the second count, which was tried and decided on the merits. I ask only for a review of the judgment below in sustaining the exceptions to the third, fourth, and fifth counts of the original libel and the exceptions to each of the five counts of the supplemental libel. These exceptions are found in the record used in the circuit court of appeals, pp. 46–49, 51–54.

The counts thus excepted to alleged separate violations, all prior to June 7, 1893, of the Chinese-restriction acts and of the revenue laws against the smuggling of opium, in consequence of which the libel claimed that the vessel had become liable to penalties aggregating $71,460 and to forfeiture.

The exceptions to these various counts are identical, and allege as the sole reason why the claimant should not answer the counts, that the vessel had been arrested and libeled by the United States in the district court for the district of Washington on June 7, 1893, for forfeiture on account of other and distinct offenses committed in different months, but prior to the filing of this libel, and that the vessel had there been released on a stipulation for value. The exceptions do not allege that the suit in Washington was still pending when the exceptions were filed. For all that the exceptions show, that suit may have been dismissed by the Government or adjudged in favor of the

claimant. The point really decided by the court below in sustaining the exceptions is, therefore, not that the *pendency* of the Washington suit was a bar to the Oregon libel, but that the Oregon libel was barred from the mere fact that the vessel had been previously arrested and bailed in Washington. I do not see that the difference is material, but it helps to expose the claimant's real contention, to be able to point out that, according to its view, the Oregon libel would be barred even if the Washington suit had already been dismissed or decided in favor of the claimant.

It appears from a transcript of the proceedings in Washington, which is printed in the record without being properly a part of it, that the suit was still pending on July 12, 1893, the date of the certificate to the transcript (Rec., C. C. A., 158), but the exceptions to the present libel were filed eight days later, viz, July 20, 1893 (Rec., C. C. A., 45), during which time the Washington libel may have been disposed of, so that even if we refer to this transcript of the Washington suit, nothing more appears than that the Washington suit was pending when the Oregon libel was filed.

BRIEF OF ARGUMENT.

The offenses charged in the Oregon libel were each separate and distinct causes of action from those alleged in the libel filed in the district of Washington. "Each separate agreement or transaction will give rise to one entire and independent cause of action" (Freeman on Judgments, 4th ed., sec. 238). "Separate torts give

rise to separate causes of action, and each cause remains unaffected by a judgment for any other tort subsequent or antecedent." (*Id.*, sec. 243.) Each offense stated in the respective counts was an isolated act, and the various offenses were not a continuing offense which would constitute, as in *In re Snow*, 120 U. S., 274, but a single, indivisible offense up to the time of prosecution.

While similar causes of action *may* be joined in a civil proceeding, as similar offenses may be joined in criminal proceedings, it is not compulsory, but, at the option of the plaintiff to do so, subject to the power of the court to order a consolidation of actions brought within its jurisdiction that might have been joined. With regard to indictments, it is provided by the Revised Statutes, section 1024, that:

> When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole *may* be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated.

In *The City of Mexico* (28 Fed. Rep. 148, 150) not only were separate libels filed in the same district by the Government for forfeiture, one based on the claim that the vessel was prize and the other upon an alleged violation of the revenue laws, but the court declined to compel the Government to elect upon which of the libels it would proceed. In this connection, the following language of

Mr. Justice Field in *Stark* v. *Starr* (94 U. S. 477, 485) with reference to claims growing out of one transaction is pertinent:

> It is undoubtedly a settled principle that a party seeking to enforce a claim, legal or equitable, must present to the court, either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible. But this principle does not require distinct causes of action—that is to say, distinct matters—each of which would authorize by itself independent relief, to be presented in a single suit, though they exist at the same time and might be considered together.

It is admitted that a suit to recover a penalty or to enforce a forfeiture may be brought at anytime within five years from the time when the penalty or forfeiture accrued (Rev. Stat., sec. 1047); and also that for a forfeiture incurred under the Chinese restriction acts the vessel "*shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found.*" (Section 10 of the act of May 6, 1882, as amended by the act of July 5, 1884, c. 220, 23 Stat., 115.)

Upon what, ground, then, did the court rest its decree that the second libel could not be proceeded with?

The general rule is thus stated by Mr. Justice Miller in *Watson* v. *Jones* (13 Wall., 679, 715):

> But when the pendency of such a suit is set up to defeat another, the case must be the same. There must be the same parties, or at least such as represent the same interest; there must be the same rights asserted and the same relief prayed for. *This relief must be founded on the same facts*, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending cases had already been disposed of, it could be pleaded in bar as a former adjudication of the *same matter* between the same parties.

In *Insurance Company* v. *Brune's Assignee* (96 U. S., 588, 592), an injunction to stay two actions at law which had been commenced in the circuit court for the district of Maryland by one Whitredge was applied for on the ground of the pendency of a prior suit in equity against the complainant and said Whitredge and one Brune, instituted in the courts of the State of New York prior to the bringing of the Maryland actions, for the same subject of action, it being claimed that the prosecution of the Maryland actions, if successful, would result in compelling the complainant to pay policies of insurance twice. This court, however, affirmed a decree of the circuit court refusing an injunction, upon the ground that no final decree had been rendered in the New York suit, with the observation that when a final decree was rendered it would be pleadable in bar in the actions in Maryland, and the complainant would have complete protection at law. In other words the danger of a double liability will not suffice to

warrant the restraining of a second action before judgment in the first.

The judgment of the circuit court of appeals, in apparent conflict with these elementary principles, proceeds upon the ground that the bonding of a vessel, libeled for forfeiture, releases her from liability in any other action for all penalties and forfeitures incurred prior to the filing of the libel, because, they say, the bond takes the place of the vessel with respect, not only to the grounds of forfeiture set up in the libel, but as to all other existing causes of forfeiture.

This, I submit, is an erroneous view.. A stipulation in admiralty is given with reference to the *particular* claims set up in the libel. It is only a substitute for the vessel *to the extent of the claim made in the libel*, the right to recover on which depends upon sustaining the "reasons and causes" for forfeiture alleged therein. (*The T. W. Snook*, 51 Fed. Rep., 244, Blodgett J.)

The condition of the bond given in the Washington suit was as follows (Rec. C. C. A., 144):

> The condition of the above obligation is such that whereas the libel of information was filed on the 7th day of June, A. D. 1893, by the United States of America against the steamship *Haytian Republic*, her engines, boilers, tackle, apparel, and furniture, *for the reasons and causes in said libel mentioned.*

And the stipulation concludes:

> Now, therefore, if in the event that the judgment of said court above entitled, or that of any other appellate court to which the same may be appealed, passes against said claimant, as to the whole or any

> part of said vessel, her engines, boilers, tackle, apparel, and furniture, the said bounden obligors shall pay into the said court, or to the proper officer thereof, within twenty days from the date of any such decree on account of the value of said vessel, together with the costs of the above-entitled cause, or if judgment of the court passes in favor of the claimant, then this obligation to be void, otherwise to remain in full force and effect.

In other words, the sureties agree to respond to any judgment recovered "for the reasons and causes in the libel mentioned." It is not a stipulation such as is given in a case of limited liability, under Rev. Stat., sec. 4283, where the sureties become liable, not exceeding the stipulated value, for all claims asserted *or which may be asserted* against the vessel claiming the benefit of the limited liability. (See *The Benefactor*, 103 U. S., 239.)

Where a stipulation for value has been given, only the *particular lien or encumbrance* is removed from the vessel. (*The Union*, 4 Blatch., 90, 93); and, if the libellant prevails, the decree is against the claimant and his sureties. (Rev. Stats., sec. 938; *United States* v. *Ames*, 99 U. S., 35, 40.) To use the language of Mr. Justice Nelson in *The Union* (4 Blatch., 90, 93):

> The vessel, after being discharged from the arrest upon the giving of the bond or stipulation, returns into the hands of her owner, subject to all previously existing liens or charges, the same as before the seizure, *except as respects that on account of which the seizure was made.* She is also subject to any subsequently accruing liens or charges in the hands of her owner, or in the hands of any person to whom she may have been transferred.

The circuit court of appeals rely upon a passage in the opinion of Mr. Justice Clifford in *United States* v. *Ames* (99 U. S., 36); but in that case the court simply held that the lien of the *particular claim* sued on was transferred from the vessel to the stipulation for value, and that *such* lien must be worked out through the bond. Neither the court nor Williams and Bruce, whose language Mr. Justice Clifford adopted, meant to assert that *all* liens and charges of the libelant, as well those *not* asserted in the libel as those asserted, were transferred to the bond. The following is the whole of the passage referred to from Williams and Bruce:

> Bail is a pledge or substitute for the property as regards all claims that may be made against it by the plaintiff *in respect of the action.* It is to be considered as a security, not for the amount of the claim but simply for the value of the property arrested *to the extent of the claim* and the costs of suit. (Williams and Bruce's Admiralty Practice, 2d ed., 283.)

The suggestion that the Government should have set up in the suit in Washington the separate and distinct causes of forfeiture for which it afterwards sued in Oregon is not tenable as a ground for dismissing the latter suit, even assuming that the Government might have amended its Washington libel by adding those grounds of forfeiture.

Suppose the grounds of forfeiture alleged in Oregon were not discovered until after the suit in Washington had passed to a judgment in favor of the claimant—and this hypothesis is quite consistent with anything alleged in the exceptions—does the fact that the vessel was not

guilty of the offenses charged against her in the Washington suit, her bondsmen there being released from liability, give her immunity from other offenses of which she is guilty, and for which she has never been tried?

Or suppose that the vessel had committed an offense in the district of Massachusetts for which she was liable to be forfeited. According to the view of the circuit court of appeals, the Government could not have awaited her return to that jurisdiction, but must, in the event of her seizure in the district of Oregon for a forfeiture offense committed subsequent to the violation of law in the district of Massachusetts, intervene in the proceedings in the far Northwest, and if it failed to do so, either through ignorance of the violation of law committed in Massachusetts, or because it did not wish to incur the risk and expense of establishing the offense so far removed from where it had been committed, the vessel would be protected by a judgment in its favor in Oregon from further molestation for the *other offenses* committed in Massachusetts.

But the United States, if they had so desired, could not have intervened in the suit in the district of Washington, after the giving of the stipulation for value, and added new counts for other offenses than those contained in the original libel, because thereby the liability of the surety would be increased, and, if not absolutely discharged, the security would not extend to the new counts. *The Union*, 4 Blatch., 90 (Mr. Justice Nelson). *The T. W. Snook* (51 Fed. Rep., 244). *Newall* v. *Norton* (3 Wall., 257). *Seeley* v. *Brown* (14 Pick., 177). *Prince* v. *Clark* (127 Mass., 599, 601). *Ruggles* v. *Berry* (76 Me., 262).

In the *T. W. Snook* (51 Fed. Rep., 244, 245), Blodgett, J., said:

> The sureties on the bond must be presumed to have signed it solely on the understanding that their liability was only to satisfy the cause of action set out in the libel.

In *The Clara* (Swa., 1, 4), Dr. Lushington, speaking of separate suits brought for a collision under the limited liability act, said:

> If the ship had been bailed to answer the first action, that bail could not be responsible to the plaintiffs in the subsequent action.

The suggestion of the circuit court of appeals is, in respect of sureties, analogous to what Tidd, in his Practice, p. 279, declares had been an "extraordinary practice" anciently in the King's bench, under which, "if a man became bail for another upon a *latitat*, etc., in any sum of money, however trifling, he was bail for him in all actions brought by the same plaintiff, during the same term, were the sums ever so great." The special bail, however, in the ancient times had this advantage over a surety in an admiralty bond—he could surrender his principal and release himself from liability.

The circuit court of appeals lay stress upon the hardship of permitting subsequent libels for existing causes of action after a vessel has once been bailed. But the supposed hardship, if it existed, would be no ground for holding one suit an absolute bar to the other. The claimant, however, is not without remedy. He may easily protect himself against paying more than the value of the vessel

for offenses to a particular date. Whether he must wait until a judgment has been recovered against him and plead the judgment in bar of another recovery, or may resort to equity for relief, need not be determined here. When a second libel suit is commenced for a forfeiture, if it is in the same jurisdiction, the actions may be tried together, as in *The City of Mexico* (28 Fed. Rep., 148), and if various libels filed by the Government are pending in different jurisdictions, each involving a forfeiture, and bond has been given, in a proper case a stay may be obtained, pending a speedy determination in one suit; and *if a judgment of forfeiture* is rendered in that suit, it would seem proper to allow it to be pleaded in bar of the other suits.

In a case of collision, where a vessel is libeled by separate libels on distinct claims for damages arising out of the same transaction, the owner may give repeated bail bonds, and if he do not actively endeavor to protect himself (as in *Providence and N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S., 578) he may be mulcted in an amount greater than the value of his vessel. In the case of *The Clara* (Swa., 1, 7) Dr. Lushington, after an interesting review of admiralty practice prior to the limited liability act and under that act, said:

> Without expressing a positive opinion, I am inclined to think that where a ship is bailed, any number of actions might be commenced in this court, and prosecuted, too, unless recourse were had to the court of chancery.

Where a vessel, libeled for forfeiture, has not been bailed, but remains in the custody of the court, her

acquittal is no bar to a subsequent libel of forfeiture for other, though antecedent, offenses. No more is an acquittal, where she has been bailed. The mere pendency, therefore, of a suit for forfeiture, *which may result in an acquittal*, can not be a bar to another suit for distinct though antecedent offenses. It is only where there is a judgment of *guilty*, and the proceeds of the vessel or the amount of her appraisal bond are brought into court, that she is released from further liability for prior offenses in other actions; and her release in such case proceeds, not upon the ground that the prior causes of forfeiture have been adjudicated in her favor, but upon the ground that there can be but one *satisfaction* by forfeiture of a single thing like a vessel, no matter how many grounds of forfeiture may exist.

The circuit court of appeals refused the prayer of the Government to withhold its mandate pending this application for a writ of certiorari. It is therefore important, if the writ is granted, to have the case set for an early hearing in this court, so that the vessel may be retaken promptly if the judgment is reversed.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

THE UNITED STATES, Libellants and Appellants,

vs.

THE STEAMSHIP "HAYTIAN REPUBLIC," etc., and the NORTHWEST LOAN AND TRUST COMPANY, Claimant.

Petition for a Writ of Certiorari to Review a Judgment of the Circuit Court of Appeals for the Ninth Circuit.

Brief of Respondents in Opposition to the Prayer of Petition.

STATEMENT OF CASE.

On the 6th day of June, 1893, the Steamship *Haytian Republic* was seized for forfeiture by the United States in the District Court of the United States for the District of Washington, for alleged violations of the revenue laws, by smuggling and clandestinely introducing prepared opium, and also for violation of the laws relating to the importation of Chinese laborers, committed between the 28th day of September, 1892, and the 28th day of May, 1893. Claim was interposed by her master and appraise-

ment was had upon the order of the court at the petition of claimant, and on June 9, 1893, the vessel was released upon the filing of claimant's bond for her value as appraised, and she proceeded on her way.

On the 12th day of July, 1893, by an order of said District Court for the District of Washington, duly entered in said cause, a default was taken against all persons claiming to have any right, title or interest in said vessel, save and except H. K. Struve, master, and the Northwest Loan and Trust Company, owner. (Transcript of Record, U. S. C. C. A., 49.)

Nine days prior to the date aforesaid, when said order of default was entered in the case in the Washington court, to wit, upon the 3d day of July, 1893, at the Port of Portland, Oregon, the vessel was again seized by the United States and a libel of information filed by the United States attorney for forfeiture for acts set forth in the libel.

The acts charged in this libel were of two classes:

First. Acts of a similar nature to those for which she was seized in the District of Washington, and all occurring prior to the date of her seizure there; and

Second. Acts in violation of the Chinese exclusion laws committed subsequent to her release from the former seizure.

The claimant in the Oregon court answered, denying the charges of violation of the Chinese exclusion acts alleged to have been committed subsequent to her release in the Washington court, and filed exceptions to the other counts of the libel; that is, as to the alleged acts of smuggling, alleged to have been committed prior to the date of her seizure in the District of Washington. (Record, C. C. C. A., 45–49, 51–55.)

All of these exceptions were sustained by the district court, and upon trial of the issue raised by the answer a

decree in favor of the claimant was entered. From that decree, in so far as it sustains the exceptions to portions of the libel, the United States took the case by appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the only error assigned being the decision of the Oregon district court in sustaining the exceptions to portions of the libel.

The decree of the district court was affirmed by the Court of Appeals December 18, 1893, and opinion filed therein. (See Record filed by the Solicitor-General on motion for writ of *certiorari*.)

The United States now, through the Solicitor-General applies to this court for a writ of *certiorari*, praying that the Record in said suit be certified to this court for its review and determination in pursuance of the provisions of section 6 of the act of March 3, 1891, establishing the Circuit Court of Appeals.

By leave of the court first had, the respondent, the steamship *Haytian Republic*, etc., and the Northwest Loan and Trust Company, and J. L. Hartman, receiver thereof, claimants, through their counsel intervene to resist such application for *certiorari*, and for cause submit the following:

Brief and Argument.

And first as to the precise state of the Record.

The Solicitor-General, in brief filed herein in support of motion for *certiorari* (3), says:

"The exceptions do not allege that the suit in Washington was still pending when the exceptions were filed. For all that the exceptions show, that suit may have been dismissed by the Government or adjudged in favor of the claimant."

It is submitted, it is quite immaterial whether the suit was pending in the Washington court at the date when

the exceptions were filed to the libel in the Oregon court The material inquiry is, in so far as that question is concerned, was the suit in Washington pending at the date of the seizure and filing of the libel in the Oregon court? If jurisdiction can attach at all in favor of the proceeding in the Oregon court, it must attach by virtue of the *status* at the date of the seizure and presentation of the libel in the Oregon court. If for any reason jurisdiction in the Oregon court could not *then* attach, nothing that could transpire subsequent to that date could breathe jurisdictional life into the suit.

That the suit in the Washington court was so pending at the date of the seizure and the filing of the libel in the Oregon court, affirmatively appears from the Record, not only from the transcript of the proceedings in the Washington court, made a part of the record in the Oregon court, as the Solicitor General, it is submitted, in his brief (4) mistakenly says, "improperly made a part of such Record" (Rec., C. C. A., 158); and also from the 7th exception filed in the suit in the Oregon court (Record, 49). From these two portions of the Record it is made clearly apparent that the suit was still pending in the Washington court on July 12, 1893, nine days subsequent to the date of seizure and libel filed in the Oregon court. Whether the transcript in the Washington court is or is not properly a part of the Record, and it is respectfully submitted it is, inasmuch as it appears from the Record (C. C. A., 60) that the claimant accompanied his exceptive allegations to the libel in the Oregon court with a certified transcript of the Record of the proceedings in the district court for the District of Washington, there can be no question but the exceptions to libel in the Oregon court, *supra*, are a proper part of such Record.

It is respectfully submitted, therefore, this is a sufficient averment as to the pendency of the suit in Wash-

ington, not only at the date of seizure and of filing libel in Oregon, but further, in the absence of anything to the contrary in the Record, will be regarded by the court as a sufficient averment as to the pendency of the proceedings in the Washington court *at the time of the filing of the exceptions and the rendering of the decree in the Oregon court.* If, therefore, jurisdiction could attach at date of seizure and filing libel, and exceptions are to be regarded as a plea in abatement, or bar, even in such event the averment as to pendency of suit in the Washington court at date of filing exceptions is sufficient.

It will be observed from the Record that no exceptions were taken upon the part of the Government in the courts below to the manner in which the question as to the pendency of the suit in the Washington court was raised by exceptive allegations to the libel, nor is any question of this character now raised by the Solicitor-General in the pending motion.

In addition to the foregoing, it is respectfully suggested that this point as to insufficiency of averment as to the pendency of suit in the Washington court at date of filing exceptions was not raised by the Government, either in the District Court or in the Court of Appeals. It will, therefore, on this motion be deemed to have been waived, and will not be considered by this court.

The only alleged error complained of here and upon which a review is asked is the affirmance by the Court of Appeals of the decision of the Oregon district court in sustaining the exceptions of respondent to the third, fourth, and fifth counts of the original libel, and the exceptions to each of the five counts of the supplemental libel. (Record, C. C. A., 46–49, 51–54.)

It is respectfully submitted the well-recognized rule which requires the boundaries of the jurisdiction of courts of equal jurisdiction in different states or districts,

both as to persons and subject-matter, to be clearly defined and recognized, to the end that proceedings in one shall not in any respect, or in the slightest degree, be obstructed or delayed by proceedings in the other, will not permit a second seizure and libel *in rem* against a vessel, pending seizure and proceedings thereunder in another jurisdiction, or even in the same jurisdiction, and for alleged cause or causes of forfeiture existing at the date of the first seizure. If there can, under such circumstances, be a second seizure, then there may be a third, and a fourth, or even more, in as many other districts, or even in the same district.

The right of the claimant to give bond and have the vessel released is a statutory right—one which attaches as often as a seizure occurs, but he must give bond conditioned for the payment of the full appraised value of the vessel in the event of condemnation. If there can be two or more seizures of the same vessel in as many different districts and as many different bonds given for the value of the vessel, and a decision in each case be entered in favor of the Government, may not the claimant, nay, will he not, be compelled to respond on these several bonds to an amount double or treble, as the case may be, of the value of the vessel?

The Solicitor General suggests in his brief (13) that:

"If various libels filed by the Government be pending in different jurisdictions, each involving a forfeiture, and a bond has been given, in a proper case a stay may be obtained, pending a speedy determination in one suit, and if a judgment of forfeiture is rendered in that suit, it would seem proper to allow it to be pleaded in bar of the other suits."

It is respectfully submitted any rule which will make the progress of the proceedings in one district court depend on the progress or delay of similar proceedings in another district court, ought not to be regarded with favor by this court.

It is not denied that when the claimant secured the release of his vessel by giving the necessary bond in the Washington court that he took it subject to all existing liens, such as a prior mortgage given by the owner, the lien of a mechanic or material man, or the like. But that is a very different proposition from that sought to be enforced here. In this case, as was very properly stated by the district court (Rec., C. C. A., 62), "the effect of what is attempted is to make the owner liable for the appraised value of the vessel on account of the forfeiture, and continue the vessel's liability to forfeiture as before."

There is no similitude between the cases of a claimant receiving back his vessel subject to any existing liens thereon and receiving it back when there has been a forfeiture, but are no liens. In the one case the owner has not only satisfied the demands of the Government, but has also protected his creditor who holds a lien, by becoming responsible to the Government in double the value of the vessel, conditioned that he will pay its full value into the court in case of condemnation, while in the other case he simply satisfies the demands of the law. He fully meets the claims of the Government, which in a sense is his creditor, by substituting his pledge of money for the property seized. And as there can be but one confiscation of the *res* in any case, regardless of the number of causes justifying such confiscation, and as it is the duty of the Government to present its whole case at once and in the one suit, and not in piecemeal, it follows when claimant avails himself of his statutory right of substituting his bond for the vessel, then the vessel goes forever free from further seizure, either in the same or any other jurisdiction, for any alleged offense which may be a cause of forfeiture committed prior to the first seizure.

The case is not different in so far as the power of the

Government to enforce a second forfeiture and second confiscation of the vessel is concerned from that it would be had the claimant failed to give bond in the Washington court; the vessel had been sold and claimant had become the purchaser. In either event the whole rightful claim of the Government has been met, namely, the right to confiscate the vessel, whether for one cause or a dozen precedent causes of forfeiture. In either case, it is respectfully submitted, the offense or offenses against the law are wiped out, forever obliterated, in so far as any claim of the Government to the vessel is concerned. By the forfeiture of the vessel to the Government—as a vessel to be sold—the purchase money to go into the Treasury of the United States, or by collection on the bond, after decree of condemnation, of the full value of the vessel, the latter is completely absorbed. And there is nothing left on which any further claim can be made by the Government on account of causes of forfeiture existing at date of seizure.

This being a proceeding *in rem*, not in *personam*, it is clear the case does not come within the category of cases permitting separate suits as upon separate and distinct demands; upon the contrary, this proceeding *in rem* comes clearly within the doctrine laid down by this court in Stark *v.* Starr (94 U. S., 447–485, Opinion by Mr. Justice Field), as follows:

"It is undoubtedly a settled principle that a party seeking to enforce a claim legally or equitably must present to the court, either by the pleadings or in proof, *all of the grounds upon which he expects a judgment in his favor.* He is not at liberty to split up his demand and prosecute it by piece-meal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit if the first fail. There would be no end to litigation if such a practice were permissible."

What was the special relief sought by the Government in the proceeding in the Washington court? Simply the

confiscation of the vessel. This being so, the Government was, in the language of the opinion, *supra*, "not at liberty to split up its demand and present it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in the second suit if the first fail."

As this court in that case very properly said, "there would be no end to litigation if such a proceeding were permissible."

It is suggested by the Solicitor General that a stipulation in admiralty is given with reference to the particular claim set up in the libel (brief, 8), and from this assumption the argument is sought to be adduced that the right remains upon the part of the Government to enforce a second seizure and condemnation for causes existing prior to the first seizure and not alleged in the first libel. While it is quite true the stipulation in such a case is given with reference to the particular claims set up in the libel, the condition, however, is that in the event of condemnation the whole value of the vessel shall be paid into court, whether there be one cause or a dozen causes of forfeiture alleged in the libel and proven. The rightful demand of the Government in the case for satisfaction for violated laws extends to the whole vessel—not to a part of it merely or to a lien upon it for a certain amount, and in the event of a bond to the whole value of the vessel, and in neither case is there anything left to which another seizure can attach or upon which further proceedings for condemnation can operate.

It is further suggested by the Solicitor General that the United States could not have amended their bill in the Washington court after accepting stipulation for value and added new counts for other offenses than those contained in the original libel. Without stopping to inquire whether this proposition is correct or otherwise, it is enough to say in answer that under all the authorities it was the duty of the United States, in filing the libel

upon seizure, to set out *all the causes that existed* upon which the condemnation of the vessel is sought; and if, for any reason, there has been a failure in this regard, the Government is estopped from further seizure.

What would be the result of a final decision either way by the Washington court as a bar to future seizures and suits for antecedent causes of forfeiture, whether such causes were or were not included in the libel in that case? The answer to this query is a proper test as to whether the Oregon court could acquire jurisdiction pending the suit in the Washington court, or if jurisdiction could attach, whether it could stand against a plea of *lis pendens* in the Washington court.

It is respectfully insisted such final decree in the Washington court, either condemning the vessel on the one hand, or exonerating the owner against all charges preferred on the other, would be an absolute bar to any future suit against the same vessel, either on account of the causes of forfeiture alleged in the bill or any similar antecedent causes, not included in the bill. If this be true, then a plea in abatement or bar, or exceptions filed, which amount to the same thing in effect to the bill in the Oregon court, must abate the proceedings in that suit.

Chief-Justice Marshall, in Osborn *v.* The Bank of the United States (9 Wheat., 738), said:

"To ascertain what is embraced in a cause it is necessary to consider what will be concluded by the judgment, and a judgment is confessedly conclusive of *every point which might have been raised in pleading, whether it is or is not actually put at issue and determined.*"

A former judgment between the same parties in which a claim was decided or was properly involved and might have been decided is a bar to another action or suit as to such claim.

So says this court in Stockton *v.* Ford, 18 How., 418.

The rule is that the judgment or decree of a court of competent jurisdiction is not only conclusive on all questions actually and formally litigated, but as to all questions which *might properly have been raised and determined*, whether formally litigated and determined or not.

Authorities, *supra*;
Barrett *v.* Failing, 8 Oreg., 156;
Bellinger *v.* Croigne, 31 Barb., 357.

Freeman on Judgments, section 253, says:

"The identity of the subject-matter must appear. This is done where all the objections and matters of defense in the second action have been equally available in the first."

Beloit *v.* Morgan, 7 Wall., 609;
Cornwall *v.* County of Sacramento, 94 U. S., 351;
Davis *v.* Brown, *Id.*, 422.

Freeman on Judgments, section 249, says:

"The discovery of new evidence, not in the power of the party at the former trial, forms no exception to the rule in relation to estoppel, whether the second action is at law or in equity."

Freeman on Judgments and Estoppel, page 249, truly says:

"An adjudication is final and conclusive not only as to the matter actually determined, but as to *every other matter which the parties might have litigated and have decided* as incident to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both in respect to matters of claim and of defense."

Judge Lord, in Neil *v.* Tolman, 12 Oreg., 289, illustrates these principles, and truly says:

"The rule is well settled that a party can not relitigate matters which he *might have interposed but failed to do it.*"

Freeman on Judgments and Estoppel says:

"If either party omits to set forth and prove *all the grounds of his right* or his adversary's want of it, he can not correct his error by bringing another suit upon the portion or fragment of the case omitted."

Starr *v.* Stark, 1 Saw., C. C., 275.

In Hermann's late work on Estoppels and *Res Judicata*, 1st volume, section 409, several cases are given directly in point, and he cites the following authorities:

Young *v.* Babylon, 91 Pa. St., 280;
Wright *v.* Dunning, 46 Ills., 271;
Nichelus *v.* Dibbell, 61 Tex., 539;
Chapman *v.* Chapman, P. F. Smith, 214.

In Ferrier's case, 6 Coke, 7, the vice chancellor, in disposing of the case said:

"Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, the court requires the parties *to bring forward their whole case*, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter which *might have been brought forward* as part of the subject in contest, but which was not brought forward, only because the party has, from negligence, omitted part of his case."

"In the case of Gardner *v.* Buckbee (3 Cowen, 120), it was held by the Supreme Court of New York that a verdict and judgment in the Marine Court of the city of New York upon one of two notes given upon a sale of a vessel, that the sale was fraudulent, the vessel being at the time unseaworthy, were conclusive upon the question of the character of the sale in an action upon the other note between the same parties in the Court of Common Pleas."

And this authority is quoted with approval in the opinion of this court in Cromwell *v.* County of Sacramento, 94 U. S. 354.

In the case of the United States *v.* Ames (99 U. S., 35) this court held, opinion by the late Mr. Justice Clifford, that a bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty is in the subsequent proceedings a substitute for the property, and a decree rendered on such a bond given with sureties by the claimant at the request and for the benefit of his firm to which the property so delivered to him belonged, bars a suit against the other partners. The court said:

"Bail in such a case is a pledge or substitute for the property as regards all claims that may be made against it by the promoter of the suit. It is to be considered as a security, not for the amount of the claim, but simply for the value of the property arrested to the extent of the claim and costs of suit, if any, beyond the preliminary stipulation. (Williams & Bruce, Prac., 210.)"

Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court, which the tribunal could properly exercise if the thing itself were still the property of the court.

The Palmyra, 12 Wheat., 1;
The Wanata, 95 U. S., 611;
The Steamer Webb, 14 Wall., 406.

If, for any reason, whether from lack of knowledge of the existence of the causes of forfeiture or otherwise, the United States failed to include all existing antecedent causes of forfeiture in the original libel in the Washington court, it was within the power of the Government, at any time before the final decree, to recall the vessel, can-

cel the bond or stipulation given, amend the libel, and either hold the vessel or require a new bond.

The Hero, Brown and Lush., 447;
The Union (?), 4th Blatch., 90;
The Duchese, Swabey, 264;
The Virgo, 13 Blatch., 255;
The Adeline and Cargo, 9th Cranch, 244;
The United States *v.* Ames, 99 U. S., 42.

When the court has parted with the possession of a vessel on bond or stipulation it may be retaken, in case of necessity, by monition, even in the case of one not a party to the stipulation.

The Gran Para, 10 Wheat., 497;
Rule 8, Admiralty Rules of Practice.

Good faith will not permit the United States for any reason to omit presenting all the causes for forfeiture that may exist at the date of the filing of the libel, accept a bond from claimant, and immediately proceed, as was done in this case, with a second seizure, either in the same or another jurisdiction, for causes of forfeiture existing at the date of the first libel, which might have been included, and which it was the duty of the Government to include in that libel.

Benedict's Admiralty, section 403–447.

Benedict, in his Admiralty Practice, 3d edition, section 403, says:

"In like manner, if the suit be *in rem*, the libellant may join in the same libel any number of demands against the thing; indeed, it would seem that he must do so, inasmuch as he could hardly be permitted again to attach the thing in the innocent hands of a purchaser at his own sale."

Dunlap's Prac., 88;
Betts' Prac., 20.

These authorities would seem to be directly in point upon the question that the Government must include in its libel against a vessel in which forfeiture is claimed all the causes of forfeiture which existed at the date of the filing of the libel.

Judge Bellinger very clearly and correctly states the situation and the law (Rec., C. C. A., 62, 63) as follows:

"True, it is said that the continuing liability is for another offense, but this is a mere juggling with words. There can be but one forfeiture, no matter how many offenses there are at the time of the seizure. If the position of the United States is correct, then it may have as many distinct proceedings of condemnation as there are offenses charged in the libel. But if so, the aggregate result is a single forfeiture. This is the sum of its remedies. A party can not increase his recovery by the expedient of multiplying suits upon causes proper to be joined in one suit. The position of the Government is that the claimant, upon giving bond at Seattle, took the vessel subject to forfeiture as he might have taken her subject to a lien. But by such assumed taking the owner as a matter of fact took nothing, since he could not take what was equally forfeited after the bond as before. Upon such a theory as is relied upon in the libel the United States may lie by through one proceeding until the owner of a seized vessel gives a bond for her discharge, and then start another like proceeding, to be followed by still another in a series of suits as long as the owner may be encouraged to bail the ship from successive arrests."

The case of the City of Mexico (28 Fed. Rep., 148–150), cited in the brief of the Solicitor General, is not in point. In that case a libel had been filed against a vessel founded on the law of nations, and in which case, if declared a prize, one moiety would go to the captors, the other to the United States. This libel was dismissed, and it was insisted this proceeding was a bar to a second libel in the same court for the violation of the municipal statute

(sec. 5283, Rev. Stats.), and under it, in case of condemnation, the informer has a right to a moiety. The court very properly held the proceedings in the first case were no bar to proceedings in the second.

In view of the foregoing, it is respectfully submitted it is apparent on the face of the record presented that there was no substantial error in the proceedings in the court below, and that the application for writ of *certiorari* to bring up the record should be denied.

Respectfully submitted.

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